

Maine Law Review

Volume 57
Number 2 *Symposium: Reflections from the
Bench*

Article 3

June 2005

Some Reflections On Dissenting

Kermit V. Lipez

Follow this and additional works at: <https://digitalcommons.mainerlaw.maine.edu/mlr>



Part of the [Courts Commons](#), [Judges Commons](#), [Jurisprudence Commons](#), and the [Legal Profession Commons](#)

Recommended Citation

Kermit V. Lipez, *Some Reflections On Dissenting*, 57 Me. L. Rev. 313 (2005).
Available at: <https://digitalcommons.mainerlaw.maine.edu/mlr/vol57/iss2/3>

This Article is brought to you for free and open access by the Journals at University of Maine School of Law Digital Commons. It has been accepted for inclusion in Maine Law Review by an authorized editor of University of Maine School of Law Digital Commons. For more information, please contact mdecrow@maine.edu.

SOME REFLECTIONS ON DISSENTING

Honorable Kermit V. Lipetz

- I. INTRODUCTION
- II. HISTORY
- III. ONGOING DEBATE
- IV. WHEN TO START WRITING
- V. THE AUDIENCES
 - A. *Law Court*
 - B. *Court of Appeals*
- VI. FUNCTIONS
 - A. *Improving the Majority Opinion*
 - B. *Damage Control*
 - C. *Future Law*
 - D. *The Call for Reform*
 - E. *A Forum for Debate*
- VII. WHEN TO DISSENT
 - A. *Protest*
 - B. *Constitutional Issues*
 - C. *Consolation Prize*
 - D. *Waste Not*
 - E. *Unbowed*
 - F. *Remembering Where You Came From*
 - G. *Blood in the Neck*
- VIII. CARING ABOUT HERRING: WAS IT REALLY WORTH IT?
- IX. FRAMING THE ISSUE
- X. THE VOICE OF THE DISSENTER
- XI. COLLEGIALLY
- XII. VINDICATION
- XIII. CONCLUSION

SOME REFLECTIONS ON DISSENTING

*Honorable Kermit V. Lipez*¹

I. INTRODUCTION

In the collegial world of appellate judging, where the dominant impulse is consensus, dissents depart from the norm. If their language is sharp, the dissents may offend colleagues and worry court watchers who expect consensus. These self-assigned opinions also add to the pressures of the work.

Given these implications, the choice to dissent should never be a casual one. You must weigh the institutional and personal costs and benefits, understand the purpose of the dissent and the audiences for it, and always be attentive to style and tone.

In a haphazard sort of way, I consider these issues when I write a dissent. But doing a job over time can instill the dangerous notion that you know what you are doing. You tend to ask yourself less pointed questions, and you are more likely to make a mistake. I have now been an appellate judge for over ten years, first on the Maine Supreme Judicial Court (Law Court) and now on the United States Court of Appeals for the First Circuit.² I wrote twenty-four dissents during my four years on the Law Court. I have written fifteen dissents during my six and a half years on the court of appeals. I have no idea whether these numbers are large or small. I have not compared them with other judges, and I am not suggesting that I dissent more than other judges. These numbers only describe my personal experiences with dissenting. With more dissents in the offing, it is simply time for some reflections on what I have been doing.

I have reviewed some of the legal commentary on dissents and my own dissents. On the basis of that reading, I have some information and observations on dissenting that I would like to share. In doing so, however, I must extend an apology to past and present colleagues. To make some of the points I wish to make, I quote from my own dissents, sometimes approvingly. I also describe my view of the case when I use these quotes. This approach is a bit unseemly and unfair. My dissents were written in response to the majority opinions of exceptionally able, fair-minded judges. My disagreements never diminished my respect and admiration for them. But if readers want the rest of the story in the cases that prompted my dissents, they will have to read the majority opinions of my colleagues. This article is not about those cases. Instead, it is about the practice and process of dissenting, with my own dissents as part of the inquiry. When cited, they are offered as examples, not exemplars.

1. Judge, United States Court of Appeals for the First Circuit. I want to acknowledge and express my gratitude to my law clerk, Alana Hoffman, for her invaluable research and editorial assistance in the preparation of this article and to my secretary, Anita Germani, for her exceptional skills in decoding my dictation and deciphering my handwriting. I also want to thank my wife, Nancy Ziegler, for her perceptive comments on this article.

2. I sat on the Maine Supreme Judicial Court from May 12, 1994, to June 30, 1998, and began serving on the First Circuit on July 1, 1998.

II. HISTORY

For better or worse, the United States Supreme Court is the model for many appellate court practices. Hence, we can understand something about the history of dissents in appellate court practice by looking briefly at the history of dissents on the United States Supreme Court. In his frequently cited lecture on dissents,³ Justice William Brennan traced some of that early history under the leadership of Chief Justice John Marshall:

Until John Marshall became Chief Justice, the Court followed the custom of the King's Bench and announced its decisions through the seriatim opinions of its members. Chief Justice Marshall broke with the English tradition and adopted the practice of announcing judgments of the court in a single opinion. . . . Unanimity was consciously pursued and disagreements were deliberately kept private.⁴

Justice Brennan noted that "[t]his new practice . . . was of great symbolic and practical significance at the time. . . . [It] consolidated the authority of the Court and aided in the general recognition of the Third Branch as co-equal partner with the other branches."⁵ Although Chief Justice Marshall's insistence upon unanimity did not long prevail,⁶ dissents remained the exception in Supreme Court practice well into the 1920s.

Indeed, a Canon of the American Bar Association's Code of Judicial Conduct, on the books from 1924 until 1972, urged judicial restraint in the publication of dissents: "It is of high importance that judges constituting a court of last resort should use effort and self-restraint to promote solidarity of conclusion" ⁷ Judges were told that they should not "yield to pride of opinion" ⁸ Moreover, "except in cases of conscientious difference of opinion on fundamental principle, dissenting opinions should be discouraged."⁹ As Linda Greenhouse, the Supreme Court reporter for the *New York Times*, has written:

Canon 19 reflected the spirit of the times when the bar association adopted it. During the 1920's, the Supreme Court under the leadership of Chief Justice—and former President—William Howard Taft decided more than 80 percent of all its cases unanimously. Most dissents "are a form of egotism," the chief justice wrote in a letter to Justice Willis Van Devanter, adding, "They don't do any good, and only weaken the prestige of the court. It is much more important what the court thinks than what any one thinks."¹⁰

3. William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427 (1986).

4. *Id.* at 432-33.

5. *Id.* at 433.

6. As Justice Brennan recounts, Justice William Johnson "issued a substantial concurrence" in one of the first cases following his appointment in 1804. *Id.* at 434. Justice William Paterson, who was appointed to the court in 1793, issued "the first true dissent from a judgment and opinion of the Court" in 1806, and others began to follow. *Id.*

7. Linda Greenhouse, *Ideas & Trends: Divided They Stand; The High Court and the Triumph of Discord*, N.Y. TIMES, July 15, 2001, at 4-1.

8. *Id.*

9. *Id.*

10. *Id.* (citing Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1311 (2001)).

With the Court under political attack in the 1920s:

[T]he justices suppressed [their internal disagreements] for what they saw as the institution's collective good. By maintaining a united front, the justices sought to avoid giving ammunition to the court's political enemies, who could be expected to seize on a divided opinion as evidence that the court was making policy rather than discovering the one true answer to a legal question.¹¹

However, a single event changed forever this "norm of acquiescence."¹² In 1925, the Supreme Court received from Congress its certiorari authority, giving it the power to decide which cases it would hear from among those submitted for review.¹³ Now, "[t]he Supreme Court was no longer the court of last resort for private disputes; the justices could turn down those cases to concentrate on legal issues with broad national implications."¹⁴ In other words:

The justices were not simply resolving particular disputes but superintending the development of the legal system as a whole. This new focus in turn bolstered the concept of law as an evolutionary process rather than a static set of rules to be applied to particular facts and . . . made it less likely for justices to acquiesce in decisions with which they did not agree.¹⁵

Justice William O. Douglas summarized the import of this change in the law when he wrote in an article in the 1940s that "[i]t is the democratic way to express dissident views."¹⁶ He added that "[o]nly fascists and Communist systems insist on 'certainty and unanimity in the law.'"¹⁷

Statistics cited by Justice Antonin Scalia bear out the dramatic change in legal culture resulting from the grant of certiorari authority to the Supreme Court:

One scholar has calculated that up until 1928 dissents and concurrences combined were filed in only about fifteen percent of all Supreme Court cases. Between 1930 and 1957 dissents alone were filed in about forty-two percent of all Supreme Court cases. [In the 1992] term, a dissent or separate concurrence was filed in seventy-one percent of all cases.¹⁸

When Justice Brennan delivered his lecture on dissents in 1986, he noted that of the fifty-six opinions he wrote during the Supreme Court's previous term, forty-two of them were dissents.¹⁹ To be sure, that number reflected a dramatic change in the philosophical direction of the Supreme Court. But that number also meant that dissents had become an accepted part of Supreme Court practice. Indeed, the very ordinariness of a dissent in Supreme Court practice reflected the Court's institutional self confidence. As Linda Greenhouse has put it: "The concern that animated the earlier justices—that divided decisions might call into question the legitimacy of judicial review itself—now seems quaint."²⁰

11. *Id.*

12. *See id.* Greenhouse credits the phrase "norm of acquiescence" to Robert Post. *See* Post, *supra* note 10.

13. *See* Greenhouse, *supra* note 7; Act of Feb. 13, 1925, ch. 229, 43 Stat. 936, 936-42 (1925).

14. Greenhouse, *supra* note 7.

15. *Id.*

16. *See id.*

17. *See id.*

18. Antonin Scalia, *The Dissenting Opinion*, 1994 J. SUP. CT. HIST. 33, 35 (1994) (citations omitted).

19. Brennan, *supra* note 3, at 427.

20. Greenhouse, *supra* note 7.

III. ONGOING DEBATE

Still, some of our greatest jurists have expressed skepticism about dissents. Judge Learned Hand complained that a dissenting opinion “cancels the impact of monolithic solidarity on which the authority of a bench of judges so largely depends.”²¹ Justice Oliver Wendell Holmes remarked in his first dissent on the Supreme Court that dissents are generally “useless” and “undesirable.”²² In more recent years, Justice Potter Stewart labeled dissents as “subversive literature.”²³ As Justice Brennan has noted, these criticisms reflect the “paradox” of the court, which is

[A]t once the whole and its constituent parts. The very words “the Court” mean simultaneously the entity and its members. Generally, critics of dissent advocate the primacy of the unit over its members and argue that the Court is most “legitimate,” most true to its intended role, when it speaks with a single voice. Individual justices are urged to yield their views to the paramount need for unity.²⁴

In my view, the fear that dissents undermine the legitimacy of an appellate court reflects the misguided notion that the authority of the law depends on the myth of the one right answer. How can we expect the public to respect the law, the theory goes, when the judges cannot agree on what the law is? A partial answer to that question is pragmatic. Justice Scalia has made the point well:

It seems to me that in a democratic society the authority of a bench of judges, like the authority of a legislature, or the authority of an executive officer, depends quite simply upon a grant of power from the people. And if the terms of the grant are that the majority vote shall prevail, then *that* is all the authority that is required—for a court no less than for a legislature or for a multi-member executive.²⁵

In other words, the rules are well known. The law is not some Platonic ideal. In its authoritative sense, the law is what a majority of the judges on the appellate court say it is. Acquiescence to the outcome in any given case does not depend on the unanimity of the judges. Over time, however, our governmental institutions do depend on the consent of the governed. That consent can be withdrawn if the public questions the integrity of the process. They can abide disagreements among their judges if they perceive that these disagreements reflect the conscientious efforts of principled judges to resolve complex problems.

I think that the public is sophisticated about the unavoidable uncertainties of the law. In a complex legal system such as ours, disagreements among judges do not surprise anyone. What matters far more than unanimity among appellate judges are the care and attention given by the judges to explaining their disagreements. Indeed, the debate among judges on an appellate court, respectfully phrased, with explanations that illuminate the disagreements, only enhances respect for the process that produced the divergent views. I agree with Justice Scalia that “for the

21. Frank X. Altamari, *The Practice of Dissenting in the Second Circuit*, 59 BROOK. L. REV. 275, 276 (1993) (quoting LEARNED HAND, *THE BILL OF RIGHTS* 72 (1958)).

22. See Brennan, *supra* note 3, at 429 (citing *N. Sec. Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting)).

23. *Id.*

24. *Id.* at 432.

25. Scalia, *supra* note 18, at 35.

Supreme Court of the United States, at its current stage of development and in the current age, announced dissents augment rather than diminish its prestige."²⁶ So too with appellate courts throughout the country.

Indeed, there is no more dispiriting spectacle than a contrived unanimity reflected in a bland opinion designed to obscure differences and offend nobody. As Chief Justice Charles Evans Hughes of the Supreme Court said:

[W]hat must ultimately sustain the court in public confidence is the character and independence of the judges. They are not there simply to decide cases, but to decide them as they think they should be decided, and while it may be regrettable that they cannot always agree, it is better that their independence should be maintained and recognized than that unanimity should be secured through its sacrifice.²⁷

As in all matters judicial, judgment counts. Some disagreements are trivial. Some cases are more important than others. However, when the stakes are high and the values are keenly felt, the appellate judge has a duty to dissent. There is no need to apologize. There is only a need to do the job well.

IV. WHEN TO START WRITING

To do the job well, you have to start writing at a sensible time. After oral argument and the ensuing case conference, you will know how you and your colleagues view the case. If you hold a minority view, you should begin to think about dissenting. It would be premature, however, to return to chambers and begin to write. First, there is an understanding that the conference decisions are always tentative. The judge assigned to write the opinion might have a change of heart after immersion in the record and the law. There is always the hope that your colleagues may ultimately see the case your way. Second, it is difficult to write a good dissent without a majority opinion before you. The debate between the majority and the dissent should illuminate the reasons for the disagreement. That illumination cannot take place in a vacuum. Third, there is always the possibility that you will be persuaded not to dissent by the authoring judge's opinion, which may rely on facts in the record or reasoning not set forth in the briefs.

Despite the understanding that the conference decisions are always tentative, the reality is that they usually stand. This was particularly true on the Law Court. With seven judges generally participating in the vote rather than the three on a court of appeals panel, the ship is simply harder to turn around, particularly if you are the lone vote for a different outcome. Moreover, there is a common basis for decision-making on the Law Court that a court of appeals panel does not have. On the Law Court, cases are pre-assigned to a judge, who then has a clerk in his or her chambers prepare a detailed bench memorandum that is shared with the entire court. That memorandum reflects close examination of the record of the case by the law clerk. This shared and detailed basis increases the likelihood that the decision at the conference will have a fixed quality.

On the First Circuit, there is no pre-assignment of cases. There, the presiding judge of a panel (always the most senior active judge on the panel) assigns the case

26. *Id.*

27. Brennan, *supra* note 3, at 434 (citations omitted).

at conference. Ordinarily, the record does not even go to a chambers until the writing assignment has been made. Even though your view was the minority view at conference, it is possible that the writing judge, having reviewed the law and the record post-conference with your perspective in mind, might still agree with you. Hence, it would be foolish to begin writing the dissent before receiving the draft decision from the writing judge.

There is, however, one important caveat to this "wait and see" approach. On both the Law Court and the court of appeals, there is an understanding that if you decide to dissent, you must give that dissent priority over your other work. After all, your dissent will delay the resolution of a case and the publication of an opinion by your colleagues. It would be unfair to continue working on your assigned cases while you write the dissent as time permits. Given that pressure to get the dissent done, you might have your law clerks do some of the preliminary research that will allow you to get a quick start on the dissent if the draft decision from the writing judge indicates that the majority position has held.

V. THE AUDIENCES

There are multiple audiences for a dissent; those audiences differ between the Law Court and the court of appeals.

A. *Law Court*

Your colleagues are your most immediate audience because they will be the first to see your draft. Although the hope is a slim one, there is always a possibility that you will change the mind of a colleague or two. If the vote at conference was four to three, it only takes one convert to turn your dissent into a majority opinion. That is not a fanciful possibility. From comments at the conference, duly recorded in your notes, you might have seen that one of your colleagues was more on the fence than others. It would be appropriate to draft some portions of your dissent to appeal to that colleague.

For the reasons I have indicated, you will probably not have your dissent in hand when you receive the draft of the majority opinion. Nevertheless, if you have decided to dissent, you should advise your colleagues of that decision immediately. Although they may not defer taking a position on the majority opinion until you circulate your dissent, they may, as a courtesy to you, cast their vote for the majority opinion with the caveat that they will also look carefully at your dissent, thereby reserving the right to change their minds. This courtesy at least preserves the possibility of such a change.

This possibility is another reason for moving ahead with your dissent as expeditiously as possible. The more a case recedes from the memory of your colleagues, the more difficult it will be to re-engage them in the case and win some votes. For you, working on a dissent under considerable time pressures, the dissent will be foremost in your mind, but your colleagues will have moved on to twenty other items demanding their attention.

Your next audience, of course, is the parties themselves. If you have not been able to convince your colleagues with your draft dissent, the losing party in the case will at least have the satisfaction of knowing that a judge or two saw the case their way. I have no way of knowing the value of this consolation to a losing party.

After all, a loss is a loss. But I have occasionally chosen to dissent because I wanted the losing party to have the consolation of knowing that at least one judge saw the case their way. To be sure, that consolation does not justify writing a dissent every time you disagree with an outcome. Indeed, it is one of the weaker rationales for dissenting, particularly because of the danger of overdoing dissents. You can become tiresome to your colleagues and dissipate the force of your own voice if you are seen as a chronic dissenter who must always be heard. There are times when you just have to "suck it up" and suffer in silence.

Then there is the legal community that follows the opinions of the Law Court with some care and the broader public that may read about a case with high visibility. Within the legal community, there are already lawyers thinking about future cases; your dissent may become the basis for a future argument to move the law in the direction described in your dissent. In the broader community, where understandings of legal niceties may be less important than the public's sense of the process at work, the debate between judges may reassure the public that thoughtful and caring judges are engaging each other in a reasoned effort to reach a correct answer. As I have already indicated, I think that these public disagreements, so long as they are couched in the respectful language of civilized discourse, enhance the prestige of appellate courts.

B. Court of Appeals

Of course, on the court of appeals, your audiences include your colleagues, the parties, the legal community, and the larger public. Your colleagues, however, are an audience in a different way, and there is another audience that is barely noticed on the Law Court.

We sit in panels of three judges on the court of appeals. The party that loses before the panel can petition for en banc review of the panel opinion—meaning review by all of the active members of the court and any senior judge who happened to sit on the panel.²⁸ The filing of a dissent from a panel opinion virtually assures that there will be a petition for rehearing²⁹ and en banc review. Knowing of this likelihood, and of the attention that the dissenting opinion will receive from non-panel colleagues who must vote on the petition for en banc review, you dissent from the majority opinion of your panel colleagues with these non-panel colleagues in mind.

28. En banc rehearing may be warranted if it is necessary to "secure and maintain uniformity of the court's decisions" or if the case "involves one or more questions of exceptional importance. . . ." FED. R. APP. P. 35(b). In the First Circuit, "[r]ehearing en banc shall be ordered only upon the affirmative votes of a majority of the judges of this court in regular active service who are not disqualified, provided that the judges who are not disqualified constitute a majority of the judges who are in regular active service." 1ST CIR. R. 35(a). Judges who have taken senior status—that is, who have retained their offices but taken on a reduced workload under 28 U.S.C. § 371—may not vote on a petition for en banc rehearing but may participate in deciding the case if they sat on the original panel. 28 U.S.C. § 46(c) (1993 & Supp. 2004); *see also* *Moody v. Albemarle Paper Co.*, 417 U.S. 622, 627 (1974).

29. In a petition for panel rehearing, a party must "state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended. . . ." FED. R. APP. P. 40(a)(2). Based on the petition, the original panel may agree or decline to rehear the case. If the panel agrees to rehear the case, that agreement may obviate the need for en banc review.

In writing a dissent that is directed to your colleagues who were not on the panel, you run the risk of winning by losing. That is, if you succeed in persuading three of your colleagues besides yourself to vote for en banc review, both the majority opinion and your dissent are vacated and, in effect, they no longer exist.³⁰ Given the hard work that goes into a dissent, that victory comes with a pang.

For example, in *Ellsworth v. Warden*,³¹ I dissented from the decision of the majority to grant the petitioner's request for habeas corpus from convictions in New Hampshire for the sexual assault of a child. In effect, the majority's decision meant that the petitioner would either get a new trial or be released from prison. When I wrote that the majority had, in my view, "transformed unremarkable evidentiary rulings into constitutional violations of such severity that . . . Ellsworth's state court convictions must be vacated,"³² I wanted my non-panel colleagues to understand the import of this decision for the many habeas corpus petitions we receive from state convictions raising similar issues.

Oddly, there was no petition for en banc review from the state. Concerned about the precedents set in the majority opinion, I moved sua sponte for en banc review in a memorandum circulated to my colleagues.³³ That memorandum garnered enough votes for en banc review. As a result, both the majority opinion and my dissent were withdrawn, which essentially meant that the withdrawal was noted in the West Law Reports and in the circuit's electronic docket. Oral argument was then scheduled before the en banc court. The result was a new majority opinion that adopted substantial portions of the reasoning in my dissent.³⁴ Although the en banc opinion provided for an evidentiary hearing before the district court on some of the issues raised by the petitioner, rather than an affirmance of the district court's decision dismissing the petition for habeas corpus review (the position that I had taken in my dissent), I explained in a concurring opinion why I found this outcome acceptable.³⁵ Frankly, I had hoped to undo the precedent established by the ma-

30. In the First Circuit, this disposition is "[i]n accordance with customary practice." *United States v. Councilman*, 385 F.3d 793, 793 (1st Cir. 2004); *see also*, *Ellsworth v. Warden*, 333 F.3d 1, 3 (1st Cir. 2003) (en banc).

31. No. 02-1226, 2003 WL 203467 (1st Cir. Jan. 31, 2003), *vacated en banc*, 333 F.3d 1 (1st Cir. 2003).

32. *Id.* at *14 (Lipez, J., dissenting).

33. *See* *Ellsworth v. Warden*, 333 F.3d 1, 3 (1st Cir. 2003) (en banc). The Supreme Court has noted that although the parties may petition for en banc rehearing, "to hold that counsel are entitled to speak to the *en banc* question, is not to hold that the court itself is in any way deprived of the power to initiate en banc hearings *sua sponte*." *W. Pac. R.R. Corp. v. W. Pac. R.R. Co.*, 345 U.S. 247, 262 (1953).

34. *Ellsworth v. Warden*, 333 F.3d at 2.

35. *See id.* at 8-9 (Lipez, J., concurring). I had concluded in my dissent that the government's failure to disclose a note containing exculpatory evidence did not invalidate Ellsworth's conviction under *Brady v. Maryland*, 373 U.S. 83 (1963), because the withheld evidence would have been inadmissible at trial and thus did not meet *Brady*'s materiality requirement. *Ellsworth v. Warden*, No. 02-1226, 2003 WL 203467, at *23-24 (1st Cir. Jan. 31, 2003) (Lipez, J., dissenting). On en banc rehearing, the court ruled for the first time that "the petitioner can also establish a viable *Brady* claim by demonstrating that withheld evidence, though itself inadmissible, would have led directly to the discovery of material admissible evidence." *Ellsworth v. Warden*, 333 F.3d at 9 (Lipez, J., concurring). In light of that development, I agreed that "Ellsworth is entitled to an evidentiary hearing" which would afford him the opportunity to demonstrate that the withheld evidence would have led to the discovery of other material exculpatory evidence and would allow the district court to further investigate the "nature and timing" of Ellsworth's alleged knowledge of the withheld evidence. *Id.* (Lipez, J., concurring).

jority opinion, and hence my primary audience for the dissent had been my colleagues. Although that dissent was now a relic without any decisional status, it had served its purpose.

Even if the petition for en banc review is denied and the majority opinion of a panel stands as the decision of the court of appeals, there is the real possibility of a petition for certiorari to the United States Supreme Court. When the petition for certiorari is reviewed at the Supreme Court by law clerks and perhaps even by some of the Justices, the dissent will almost surely be reviewed as part of the certiorari decision. Some dissents from court of appeals panel decisions include specific appeals for Supreme Court clarification of areas of the law that divide the circuits. Hence, the United States Supreme Court often becomes an important audience for a dissent from a court of appeals panel decision.³⁶ Justice Scalia has confirmed the reality of this audience: "At the Court of Appeals level, a dissent is also a warning flag to the Supreme Court: the losing party who seeks review can point to the dissent as evidence that the legal issue is a difficult one worthy of the Court's attention."³⁷

VI. FUNCTIONS

Dissents perform a variety of functions. I identify some of those here.

A. Improving the Majority Opinion

If nothing else, a dissent usually forces the majority to rethink the reasoning and assumptions that underlie its opinion. To be sure, the majority can choose to ignore the dissent, hoping with such dismissive treatment to signal that there is nothing in the dissent that requires a response. Although there may be times when that view of a dissent is justified, those occasions will be rare. Ideally, a dissent will improve the majority's opinion by forcing a response to the criticisms in the dissenting opinion. Then readers have a better basis for assessing the strengths and weaknesses of the competing arguments. Justice Scalia has written that "[t]he most important internal effect of a system permitting dissents and concurrences is to improve the majority opinion."³⁸ Drawing on his own experience, he notes that:

The dissent or concurrence puts my opinion to the test, providing a direct confrontation of the best arguments on both sides of the disputed points. It is a sure cure for laziness, compelling me to make the most of my case. Ironical as it may seem, I think a higher percentage of the worst opinions of my Court—not in result but in reasoning—are unanimous ones.³⁹

36. In the state court system as well, dissents on the intermediate courts of appeal are considered by the supreme court of a state in deciding those appeals. Justice Francis O'Connor of the Massachusetts Supreme Judicial Court ("SJC") has written that "[t]he Massachusetts SJC looks to the published opinions of the Massachusetts Appeals Court and especially to the reasoning not only of that court but also of dissenting opinions. The SJC looks to the decisions and supporting rationale of other intermediate appellate courts, including dissenters' views and reasoning as well." Francis P. O'Connor, *The Art of Collegiality: Creating Consensus and Coping with Dissent*, 83 MASS. L. REV. 93, 96 (1998).

37. Scalia, *supra* note 18, at 37.

38. *Id.* at 41.

39. *Id.*

Not surprisingly, when Justice Scalia writes a majority opinion which is challenged by a dissent, he does not withdraw from the contest:

[I]t is always within the power of the Justice writing the Court's opinion to disavow the exaggerations and distortions of the dissent, and to make clear the precise scope of the holding. Which is one reason why it is my practice, when writing for the Court, always to respond to the dissent, rather than to adopt the magisterial approach of ignoring it.⁴⁰

Frankly, there is less back and forth between the majority and the dissenter in Law Court and court of appeals opinions than one might expect. Disinclined to disturb the flow of their drafts with lengthy rejoinders, the authors of majority opinions usually limit their rejoinders to footnotes. There is also some concern that the debate might get too edgy, thereby creating unpleasantness that nobody wants. Also, by the time a dissent has been written and circulated, everyone involved in the case is feeling some fatigue. There is a desire to be done with the case and move on. Still, even if the responses in the majority opinion to the dissent are limited, those responses will almost surely clarify and improve the majority opinion.

B. Damage Control

Improvement in the quality of the majority opinion is an unintended consequence of a dissent. By contrast, damage control is an intended consequence. Justice Brennan has written that the dissent is "commonly used to emphasize the limits of a majority decision that sweeps, so far as the dissenters are concerned, unnecessarily broadly—a sort of 'damage control' mechanism."⁴¹

As such, the dissent is often, to use Justice Stewart's description, "subversive"⁴² by design. Such dissents seek to erode the authority of the majority opinion. I do not mean erosion in the institutional sense. The majority opinion must be followed because it is a majority opinion. But if a dissent can weaken the persuasive authority of a majority opinion, it will make it more vulnerable to change in the future. Also, a court of appeals dissent might deter other courts of appeals from adopting the majority opinion, thereby preventing what Professor Cass Sunstein has called the "precedential cascade,"⁴³ when a precedent established in one circuit quickly becomes a precedent in other circuits.⁴⁴ A dissent from a decision of a court of appeals panel will increase the likelihood that the majority deci-

40. *Id.* at 38.

41. Brennan, *supra* note 3, at 430.

42. *See id.* at 429.

43. CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT 59-60 (2003).

44. Sunstein explains that:

Especially in technical areas, courts tend to follow one another, sometimes leading to errors. The reason is not that courts would feel so uncomfortable disagreeing with other courts; it is that the predecessors might well be right, and agreement is the path of least resistance. . . . Of course precedential cascades do not always happen, and in the American legal system, splits among courts of appeals do arise. One reason is that subsequent courts often have enough confidence to conclude that earlier courts have blundered.

Id. (citations omitted).

sion will receive critical scrutiny and perhaps eventual repudiation in another circuit.⁴⁵ Justice Scalia has also noted this function of a dissent:

When a judge of one of our Circuit Courts of Appeals dissents from an opinion of his colleagues, he warns the Courts of Appeals of the other twelve Circuits (who are not bound by the *stare decisis* effect of that opinion) that they should not too readily adopt the same legal rule. And if they do not, of course—if they are persuaded by the view set forth in his dissent, pressed upon them by counsel in some later case—a “conflict” among the Circuits will result, ultimately requiring resolution by the Supreme Court’s grant of a petition for certiorari.⁴⁶

In looking at my own dissents, I have identified two where damage control was foremost in my mind. In *Swanson v. Roman Catholic Bishop*,⁴⁷ a majority on the Law Court held that the First Amendment barred any negligent supervision claim against the Catholic Church.⁴⁸ This ruling of great import came in a case that had been reported to us after the entry of an interlocutory order authorizing the report.⁴⁹ Focusing the first part of my dissent on this procedural point, I emphasized the inadequate basis for setting forth such an important principle: “[W]e have been loathe to decide constitutional issues on interlocutory report . . . when we have lacked the fully developed record that is often necessary to make the difficult judgments required by constitutional cases.”⁵⁰ After noting that the record reflected the “possibility of a threat of harm known to the church but disregarded by it,”⁵¹ I stated that “I think the court act[ed] prematurely in ruling out the possibility of such a claim for harm . . . regardless of the particular facts of the case.”⁵² In the face of the majority’s broad statement that “[i]t would . . . be inappropriate and unconstitutional for this Court to determine after the fact that the ecclesiastical authorities negligently supervised or retained the defendant,”⁵³ I tried to demonstrate the inadequate basis for such a pronouncement in the hope of making the opinion more vulnerable to reconsideration in the future. By sowing these seeds of doubt, I hoped that the decision might not stand the test of time.⁵⁴

45. *Id.* at 71 (praising judicial dissents because “they increase the likelihood that majority decisions will receive critical scrutiny,” thereby reducing the precedential cascade effect).

46. Scalia, *supra* note 18, at 36-37.

47. 1997 ME 63, 692 A.2d 441.

48. *Id.* ¶ 1, 692 A.2d at 442. The suit involved, inter alia, a negligent supervision claim against the Roman Catholic Bishop of Portland based on the plaintiffs’ allegation that their priest initiated a sexual relationship with Mrs. Swanson after she approached him about remarriage her husband in a Catholic ceremony. *Id.* ¶ 2, 692 A.2d at 442.

49. Under the Maine court rules:

If the trial court is of the opinion that a question of law involved in an interlocutory order or ruling made by it ought to be determined by the Law Court before any further proceedings are taken, it may . . . report the case to the Law Court for that purpose and stay all further proceedings . . .

ME. R. APP. P. 24(c) (2004); *see also* ME. R. Civ. P. 72(c) (abrogated 2001).

50. *Swanson v. Roman Catholic Bishop of Portland*, 1997 ME 63, ¶ 16, 692 A.2d at 446 (Lipez, J., dissenting).

51. *Id.* ¶ 19, 692 A.2d at 447 (Lipez, J., dissenting).

52. *Id.* ¶ 19, 692 A.2d at 447-48 (Lipez, J., dissenting).

53. *Id.* ¶ 12, 692 A.2d at 445 (quoting *Schmidt v. Bishop*, 779 F. Supp. 321, 332 (S.D.N.Y. 1991)) (internal quotations omitted).

54. Indeed, a recent decision by the Law Court limits *Swanson*’s reach. *See Fortin v. Roman Catholic Bishop of Portland*, No. Ken-04-72, 2005 WL 1027525, ¶ 29 (Me. May 3, 2005) (holding that *Swanson* did not preclude a claim against the Church based on allegations that it failed to report a priest’s known propensity to sexually abuse young boys to law enforcement officials and concealed the information from parishioners and the public).

Similarly, in *United States v. Beaudoin*,⁵⁵ a court of appeals search and seizure case involving an anonymous tip, a motel room, and an order to the occupants to leave their room, I felt that the majority had stretched some familiar constitutional principles beyond all recognition in affirming the actions of the police officers on the scene. I stated this concern at the outset of the dissent: "[T]he majority adopts a novel amalgam of Fourth Amendment doctrines that combines the emergency exception doctrine, the traditional exigent circumstance of risk to the safety of police officers, and the *Terry* doctrine to uphold the officers' actions under the Fourth Amendment."⁵⁶ In the balance of the dissent, I tried to explain the novel application of these doctrines in the hope that future courts, including my own, would be wary of using the decision as a precedent. In this entirely appropriate way, I was writing a subversive dissent.

C. Future Law

If damage control is an immediate impulse for a dissent, there is also the hope that the law of the dissent will eventually become the law of the jurisdiction. The dissent "is made permanently available in the published reports for the instruction of a succession of lawyers, judges and legislators, and it may do better later on. The dissenter's view, therefore, retains a potential for influence through the years"⁵⁷ In the history of the United States Supreme Court, dissenting opinions have eventually become the law on over 130 occasions.⁵⁸

However, Justice Scalia warns against excessive hope for such an outcome: "Even the most successful of our dissenters—Oliver Wendell Holmes, who acquired the sobriquet 'The Great Dissenter'—had somewhat less than ten percent of his dissenting views ultimately vindicated by later overruling. Most dissenters are much less successful than that."⁵⁹ Still, in some portion of his or her being, the dissenter always believes in the possibility of future vindication.

D. The Call for Reform

Between the more immediate goal of damage control and the distant hope of vindication, there is the call for reform that might move a court in the short term when a similar case returns for consideration, or a legislature that is listening. This possibility is particularly real in the state setting where the vastness of the federal enterprise is not such an impediment to change. I wrote three dissents on the Law Court that illustrate this call for reform in cases with recurring issues which could return to the court before the passage of decades.

In *State v. Ketchum*,⁶⁰ a seemingly unpromising dispute over the sufficiency of the evidence, the majority's conclusion that the evidence was insufficient to support a conviction for theft was linked to a rule of law that, in my judgment, made no sense. After observing Ketchum and his companions acting suspiciously in his store, a figurines dealer noted the description and registration number of the car in which they were riding and reported it to the sheriff's office.⁶¹ Later that

55. 362 F.3d 60 (1st Cir. 2004).

56. *Id.* at 71-72 (Lipez, J., dissenting).

57. O'Connor, *supra* note 36, at 95.

58. SUNSTEIN, *supra* note 43, at 71.

59. Scalia, *supra* note 18, at 37.

60. 1997 ME 93, 694 A.2d 916.

61. *Id.* ¶ 3, 694 A.2d at 917.

afternoon, the police recovered stolen figurines in that car, where Ketchum was a passenger.⁶² The State had prevailed at trial, relying on the statutory presumption that "exclusive possession of [recently stolen] property . . . shall give rise to a presumption that the defendant is guilty of the theft . . . of the property . . ."⁶³ The majority reversed Ketchum's conviction, explaining that Ketchum's presence in the car when the stolen goods were found, in the absence of other evidence of possessive acts, was insufficient to support the jury verdict.⁶⁴ Its reasoning was based on some careless language in previous cases that added to the requirement of proof of constructive possession a duplicative and unnecessary requirement that there be proof of "other possessive conduct on the part of the defendant in relation to the stolen goods . . ."⁶⁵ These types of theft cases are common in the trial courts. It was reasonable to think that a case involving the same issue could soon return to the court, which might then respond to the complaint in the dissent that "[t]o require proof of other possessive acts independent of and in addition to the constructive possession requirement makes no sense."⁶⁶

In *Taliento v. Portland West Neighborhood Planning Council*,⁶⁷ there was a background of discontent with our law on the termination of employment contracts of indefinite duration. Here, I lamented our missed opportunity to change the law:

I must respectfully dissent because the court's decision perpetuates the misapplication of special rules of contract law to claims that an employment contract of indefinite duration precludes at will termination. In my view, the record presented on Taliento's appeal provides an appropriate basis for revisiting our precedents in this area, reconsidering the extent to which an employment handbook or personnel policy that purports to govern termination may constitute a binding contract, and clarifying the principles of contract law to be applied in these employment cases.⁶⁸

In the balance of the opinion, I tried to explain the history of misapplication referred to in the opening sentence, the new direction that our law should now take, and how that new direction would apply to the facts of this case. In pursuit of the theme of reform, I included a tedious footnote itemizing the law of "38 jurisdictions [that] have recognized that implied employment contracts may be found on the basis of language in employee handbooks and in other personnel policies that restricts an employer's right to discharge an employee to particular reasons ('for

62. *Id.*

63. *Id.* ¶ 12, 694 A.2d at 918 (quoting ME. REV. STAT. ANN. tit. 17-A, § 361(2) (West 1983)). In a footnote to my dissent, I quoted the Law Court's explanation of "exclusive" in another case: Notwithstanding the fact that the term "exclusive" possession might, in ordinary usage, imply that a defendant must be in "sole" possession of recently stolen property in order for the permissible inference to come into play, this [c]ourt has held that joint possession of stolen property by two or more persons may be deemed the exclusive possession of any one of them where there is evidence that the defendant "acted in concert" with the other person or persons in possession of the property as a "participant in the crime."

Id. ¶ 19 n.6, 694 A.2d at 920 n.6 (quoting *State v. Bachelder*, 403 A.2d 754, 761 (Me. 1979)).

64. *Id.* ¶ 13, 694 A.2d at 918.

65. *Id.*

66. *Id.* ¶ 21, 694 A.2d at 921 (Lipez, J., dissenting).

67. 1997 ME 194, 705 A.2d 696.

68. *Id.* ¶ 14, 705 A.2d at 700 (Lipez, J., dissenting).

cause') or procedures for termination."⁶⁹ I also cited law journal articles that had been critical of our treatment of employment at will contracts.⁷⁰

This dissent had some force, gaining the support of two colleagues.⁷¹ Given the slim majority for maintaining the old rule, the ferment for change within Maine and the unmistakable trend in the law nationwide, there was hope that this call for reform would not await the demands of future generations.

In *State v. Spaulding*,⁷² my dissent focused on a disagreement in the application of statutory language criminalizing tampering with a public record. The debate was over the meaning of the words "received" and "tampering."⁷³ The defendant had been charged with tampering with public records based on her incorrect representation on a Certified Nursing Assistant registry application that she had no prior criminal convictions.⁷⁴ Under Maine law, the crime of tampering with public records includes knowingly making "a false entry in . . . any . . . document . . . received . . . by the government."⁷⁵ Focusing on the words "tampering" and "received," the majority concluded that a defendant could be convicted of the crime charged only if she had altered an existing document that was already a public record in the possession of the government, which was not the case here.⁷⁶ In my view, that conclusion ignored the plain language of the statute and a basic principle of statutory interpretation that "[n]o word in a statute may be treated as surplusage if a reasonable construction supplying meaning and force is otherwise possible."⁷⁷ I thought "tampering" and "received" should have been interpreted to render the statute applicable in cases "where [a] false entry is made on an application for a government service, and the application with a false entry is then given to the government."⁷⁸

This debate was not heart-stopping stuff. The dissent is almost mind-numbing in its attention to the details of statutory language and ancient precedents. Still, there was a possibility that this dissent might capture the attention of some prosecutors and legislators who could see the importance of some clarifying statutory language. Unlike the dissents in *Ketchum* and *Taliento*, where the focus was on court-made rules which the court could change, the dissent in *Spaulding* focused on the interpretation of statutory language. The interpretation of the majority would control any future prosecutions unless the language at issue was changed by the Legislature. Here, the call for reform was directed outside the court.

E. A Forum for Debate

In his article on dissents, Justice Scalia states that the issuance of majority, dissenting, and concurring opinions by the Supreme Court Justices has

kept the Court in the forefront of the intellectual development of the law. In our system, it is not left to the academicians to stimulate and conduct discussion

69. *Id.* ¶ 23 n.8, 705 A.2d at 704 n.8 (Lipez, J., dissenting).

70. *Id.* ¶ 23 n.9, 705 A.2d at 705 n.9 (Lipez, J., dissenting).

71. *Id.* ¶ 13, 705 A.2d at 700 (Lipez, J., dissenting).

72. 1998 ME 29, 707 A.2d 378.

73. *Id.* ¶ 14, 707 A.2d at 381 (Lipez, J., dissenting).

74. *Id.* ¶ 2, 707 A.2d at 378.

75. ME. REV. STAT. ANN. tit. 17-A, § 456(1)(A) (West 1983).

76. *State v. Spaulding*, 1998 ME 29, ¶ 13, 707 A.2d at 381.

77. *Id.* ¶ 15, 707 A.2d at 381 (Lipez, J., dissenting).

78. *Id.* (Lipez, J., dissenting).

concerning the validity of the Court's latest ruling. The Court itself is not just the central organ of legal *judgment*; it is center stage for significant legal *debate*.⁷⁹

Justice Scalia adds that this debate has "transformed [the Supreme Court's] reports from a mere record of reasoned judgments into something of a History of American Legal Philosophy with Commentary. I have no doubt that this has contributed enormously to the prominence of the Court and of the United States Reports."⁸⁰

Although it would be presumptuous to make comparable claims for the majority and dissenting opinions of justices on the Maine Law Court or judges on the federal courts of appeals, I nevertheless know from experience that the majority and dissenting opinions from those courts do find their way into the classrooms and casebooks. I remember from my own law school days the pleasure of reading the spirited debates in majority and dissenting opinions. These debates continue to capture the intellectual excitement of the law.

VII. WHEN TO DISSENT

Although the discussion of the functions of a dissent suggest some of the reasons for dissenting, the subject of "when to dissent" captures some considerations that go beyond function.

A. Protest

Even if you will never see another case like this one, and even if there is nothing for legislators or future judges to do, there are times when you must dissent because you cannot abide the result. In *Dasha v. Maine Medical Center*,⁸¹ the hospital had "misdiagnosed the severity of [the plaintiff's] brain tumor and subjected him to massive radiation treatments, causing him to become incompetent and unable to file a cause of action."⁸² Nevertheless, for reasons that the majority felt were unavoidable, the court applied the statute of limitations and concluded that the case was an improper one for application of the doctrine of equitable estoppel.⁸³ At the outset of the dissent, I wrote that, "[h]istorically, the courts have used equitable principles to ameliorate the harshness of the law."⁸⁴ I added that the statute of limitations defense had been invoked "in a manner so unjust that the Legislature could not have intended the result."⁸⁵ I ended the dissent with a similar assertion, stating that the Plaintiff's "capacity for any degree of self protection within the statute of limitations period was destroyed by the very party from whom he seeks redress. The application of the statute in this case has no redeeming rationality."⁸⁶

To be sure, the interplay between statutes of limitation and equitable principles is often complicated. Courts cannot invoke equitable principles to avoid the application of the statute when a legislative choice to the contrary is clear. But a

79. Scalia, *supra* note 18, at 39.

80. *Id.* at 40.

81. 665 A.2d 993 (Me. 1995).

82. *Id.* at 997 (Lipez, J., dissenting).

83. *Id.* at 996.

84. *Id.* at 996 (Lipez, J., dissenting).

85. *Id.* (Lipez, J., dissenting).

86. *Id.* at 998 (Lipez, J., dissenting).

refusal to attribute to the Legislature an unthinkable application of the statute in a rare case is consistent with institutional allocations of responsibility. Although dissents that invoke such principles can seem annoyingly self-righteous to the majority, there are times in dissent when indignation is the only choice.

Sometimes the protest is grounded in nothing more complicated than a sense of fair play. In *SC Testing Technology, Inc. v. Department of Environmental Protection*,⁸⁷ the Legislature had repealed a mandatory emissions inspection program for automobiles after it became wildly unpopular in the State.⁸⁸ As a result of that repeal, the State had allegedly breached a contract with the company that had invested a considerable amount of money in establishing the facilities to carry out the inspection program.⁸⁹ In the wake of that alleged breach, the contractor sued the State for damages.⁹⁰ To my surprise, in the presence of what seemed a compelling claim for breach of contract, the State was able to invoke the "unmistakability doctrine" to win a favorable summary judgment ruling below and to persuade a majority of the Law Court to affirm that ruling.⁹¹

In federal law, the unmistakability doctrine "recognizes a presumption that when a sovereign government enters into a contract, it does not intend to limit its ability to make its own performance impossible by means of a future sovereign act."⁹² A sovereign's power "'governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms.'"⁹³ Under Maine's version of that doctrine, "when a party enters into a contract with a state agency, it does so with the understanding that the Legislature may at some future time take action that nullifies the subject matter of the contract and, necessarily, the respective performance obligations of the parties."⁹⁴ The majority had used that doctrine to bolster its conclusion that the contract at issue expressed a clear intention that SC Testing bore the risk of legislative repeal of the inspections program.⁹⁵ Viewing the language of the contract differently, I felt that we should vacate the summary judgment and remand the matter to the superior court for inquiry by a factfinder into the intent of the parties on the risk of repeal.⁹⁶ In the long run, given the importance to a government of being a reliable contract partner, I felt that "the State's interests are best served by subjecting it to the same principles of contract law applicable to private parties. That application imposes no undue burden. The State would simply have to rely on the drafting of clear contract language, rather than legal presumptions, to protect its interests."⁹⁷

In both *Dasha* and *SC Testing*, I was not joined by any of my colleagues in dissent. I do not cite that fact boastfully. Indeed, the fact that I was not able to persuade my able, fair-minded colleagues of the rightness of my views surely gave

87. 688 A.2d 421 (Me. 1996).

88. *Id.* at 422.

89. *Id.* at 423.

90. *Id.*

91. *Id.* at 424-25.

92. *Id.* at 426 (Lipez, J., dissenting).

93. *Id.* (Lipez, J., dissenting) (quoting *Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 52 (1986)).

94. *Id.* at 424.

95. *Id.*

96. *Id.* at 427 (Lipez, J., dissenting).

97. *Id.* (Lipez, J., dissenting).

me some pause about the grounds of my dissent. For these occasions that oft-used phrase "the lonely dissent" seems appropriate. However, if the moment of doubt passes, and the indignation is still there, you should dissent.

B. Constitutional Issues

In reviewing my fifteen dissents on the court of appeals, I find that a substantial majority of them involve constitutional law issues. This is not a great surprise. The Constitution consists of glorious generalities. They are invoked by parties sparring over some of our most divisive social and political issues. Our decisions affect what government officials, including police officers, can and cannot do to us or for us. With so much at stake in these constitutional cases, and with so much room for disagreement, dissents are inevitable.

Interestingly, in writing about dissents in constitutional cases on the United States Supreme Court, Justice Scalia has observed that "the doctrine of *stare decisis* is less rigorously observed" in such constitutional cases.⁹⁸ By contrast, he observes that "in cases involving statutory law, rather than the Constitution, we will almost certainly not revisit the point, no matter how closely it was decided."⁹⁹ Although the courts of appeals are not in the business of altering the constitutional principles announced by the Supreme Court, we are in the business of trying to apply those principles in situations where the right application is not always clear. Given the willingness of the Supreme Court to revisit constitutional doctrine, there is all the more reason for judges on the courts of appeals to register their dissents in these constitutional cases.

C. Consolation Prize

In any appellate court, if your disagreement with colleagues involves the application of law to the particular facts of the case, your dissent will have little or no resonance beyond that case. On the court of appeals, if you disagree with your colleagues on a point of state law, there is usually no good reason to dissent since the state courts can disregard anything the federal courts say about their law.¹⁰⁰ Therefore, in a diversity case before the court of appeals, where the heart of the disagreement is the application of state law to the facts of that case, there is almost no justification for a dissent. Yet this coldly practical analysis leaves out the possibility of a consolation prize for the losing party in such a diversity case. I have already alluded to this rationale in discussing the audiences for a dissent. There are simply times when you feel so strongly about the wrongness of an outcome that you want the losing party to know it.

98. Scalia, *supra* note 18, at 38.

99. *Id.* As the Supreme Court has noted, "[c]onsiderations of *stare decisis* have particular strength . . . where 'the legislative power is implicated, and Congress remains free to alter what we have done.'" *Ankenbrandt v. Richards*, 504 U.S. 689, 700 (1992) (citations omitted). In other words, congressional inaction in response to the Court's interpretation of a statute is treated as an implicit ratification of that construction.

100. In cases based on the federal courts' diversity jurisdiction, see 28 U.S.C. § 1332 (1993), the federal courts apply state substantive law. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State."). However, because "[i]t is well settled that the interpretation of a state statute is for the state court to decide," state courts are not bound by a federal court's interpretation of state law. *Salemme v. Ristaino*, 587 F.2d 81, 87 (1st Cir. 1978).

For example, in *Seaboard Surety Co. v. Town of Greenfield*,¹⁰¹ there was a dispute between a school district and a surety company over the obligation of the surety to complete a project after the contractor defaulted. The case turned on the application of Massachusetts law for the provision of notice to a surety that its obligations must be performed. There were millions of dollars at stake in this litigation.¹⁰² The dispute had been a nightmare for local school board members trying to do their thankless job. I felt strongly that the district court's summary judgment ruling in favor of the surety company overlooked communications between the school district and the company that might have permitted a jury applying the concept of reasonable notice to find in favor of the school district.¹⁰³ I could not understand how the district court or our court, consistent with the requirements of summary judgment, could dispose of this case and thereby prevent a jury from performing a quintessential jury function. Although I understood that the majority's opinion did not bind the Massachusetts courts in future cases, and that my colleagues would have no interest in en banc review of a dispute involving the application of state law to the facts of the case, I nevertheless wrote a dissent explaining my disagreement with the majority's application of summary judgment principles. This case would be news in the small town that had lost the case. I thought that the school officials should be able to defend their actions by noting that one judge saw some merit in their position. Saved for such occasions, there is a place for these dissents.

D. Waste Not

Here I must confess to a less laudable motive than consoling the losing party. As I have mentioned, the decisions reached at conference are always tentative. If you have been assigned to write the opinion on the basis of a likely outcome, you still have a right to reach a different conclusion after your immersion in the record post-conference. Similarly, your colleagues retain their right to adhere to their original view of the case and reject your draft. When that happens, one of your colleagues will take over the case and write a decision that is contrary to your initial draft, which is now available to you as a dissent if you want to dissent. Is this a difficult decision? Not usually. Why waste all of that hard work and good material? You easily convince yourself that the world needs to know your better view of the case. There are one or two unnamed dissents out there that owe their existence to this thinking.

E. Unbowed

On a variation of the "waste not" theme, I have written two dissents that had a public, though brief, life as majority opinions before they became dissents. In *McCambridge v. Hall*,¹⁰⁴ I wrote for a unanimous panel to vacate the decision of the district court and grant the defendant's habeas corpus petition.¹⁰⁵ In *Chestnut*

101. 370 F.3d 215 (1st Cir. 2004).

102. The cost of completing the project after the contractor's default was estimated at \$3.8 million more than the contract funds remaining at the time. *Id.* at 217.

103. *Id.* at 225-26 (Lipez, J., dissenting).

104. No. 00-1621, 2001 WL 1097770 (1st Cir. Sept. 21, 2001), vacated by 303 F.3d 24 (1st Cir. 2002).

105. *See id.*

v. City of Lowell,¹⁰⁶ I wrote for a divided panel to affirm the decision of the district court awarding \$500,000 in punitive damages against a municipality¹⁰⁷ even though such punitive damages were not available as a matter of law under Supreme Court doctrine.¹⁰⁸ Both of those decisions produced petitions for en banc review, votes by my colleagues for en banc review (with the resulting withdrawal of the panel opinions), and an ultimate rejection by the en banc court of the positions that I had taken in the panel opinions.¹⁰⁹ For me, the only consolation (and a small one at that) was to recast my original panel opinions as dissents from the decisions of the en banc court, thereby permitting me to keep the viewpoints expressed in those original panel opinions on the books. Absent a complete change of heart as a result of the en banc process,¹¹⁰ it would be strange for the author of the panel opinion to resist recasting the original panel opinion as a dissent from the decision of the en banc court. Such silence would betray an odd lack of conviction.

F. Remembering Where You Came From

After I was nominated to the Maine Supreme Judicial Court in 1994, I was told repeatedly by my colleagues on the superior court—"Always remember where you came from." This was more than a plea for humility. They wanted me to remember the difficult work of the trial court, particularly when it comes to factfinding, and all of the times that we had groused together about the inability of the Law Court to understand what we do.

106. Nos. 00-1840, 00-1996, 2002 WL 483557 (1st Cir. Mar. 29, 2002), *vacated by* 305 F.3d 18 (1st Cir. 2002).

107. *See id.*

108. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) (holding that municipalities are immune from punitive damages in federal civil rights suits brought under 42 U.S.C. § 1983). In *Chestnut*, the City failed to object when the district court mistakenly instructed the jury that it could award punitive damages against any defendant, including the City, under § 1983. 305 F.3d at 19. Only after the district court had entered a judgment of \$500,000 in punitive damages against it did the City assert that such damages were barred by *City of Newport*. The City moved for a new trial or, in the alternative, to strike the damages. *Id.* The district court rejected the City's motion on the grounds that it had waived its immunity by failing to timely object. *Id.* at 19-20. I agreed with this rationale, asserting that "we must affirm the jury's verdict unless we conclude that allowing the punitive damages award to stand would constitute a 'miscarriage of justice[.]'" a standard not met here. *Id.* at 25 (Lipez, J., dissenting).

109. *See McCambridge v. Hall*, 303 F.3d 24 (1st Cir. 2002) (en banc); *Chestnut v. City of Lowell*, 305 F.3d at 18.

110. I had such a change of heart once. In *United States v. Kenrick*, I authored both the panel decision, No. 98-1282 (1st Cir. Feb. 22, 2000) (withdrawn) and the subsequent en banc decision, 221 F.3d 19 (1st Cir. 2000). Although both decisions affirmed the defendants' convictions for bank fraud, the en banc decision repudiated much of the reasoning in the panel decision, as I explained:

The panel that first considered this case agreed with the defendants that intent to defraud necessarily includes an "intent to harm" the bank, and that the district court erred by omitting this requirement from its jury instructions. The panel further held that there was no plain error. After further consideration of the intent issue [with the benefit of supplemental briefing], the en banc court, including the panel members, arrives at a different conclusion about the meaning of intent to defraud. We now hold . . . that the intent necessary for a bank fraud conviction is an intent to deceive the bank in order to obtain from it money or other property.

United States v. Kenrick, 221 F.3d at 26-27. I asked to write this opinion for the en banc court believing that I could do a better job of repudiating myself than anyone else.

I got that message. In *Edwards v. State*,¹¹¹ a post-conviction case heard within months of my joining the Law Court, the defendant claimed that the court had improperly accepted his guilty plea when he did not have adequate knowledge of the elements and consequences of the crime to which he pled.¹¹² The post-conviction trial court agreed, explaining that it did not have to rely on the defendant and defense counsel's "faded memories" presented at the post-conviction hearing because it had the transcript of the actual plea hearing before it.¹¹³ The majority interpreted this statement as a refusal to consider evidence presented at the post conviction hearing.¹¹⁴ In my first dissent on the Law Court, I wrote that "[r]ather than ignoring the testimonial evidence, as the Court concludes, the trial court was simply characterizing its poor quality. That was its judgment to make as the factfinder."¹¹⁵ I suspect that I heard my former colleagues whispering in my ear as I wrote those words.

To demonstrate that this sensitivity to the trial court was not a passing fancy, I later wrote a dissent in *State v. Berube*,¹¹⁶ where the majority vacated a conviction for Class A manslaughter because of its conclusion that the trial court had committed obvious error by failing to instruct the jury on a statute providing that death arising from vehicular accidents involving speeds of less than thirty miles per hour over the speed limit would be Class B manslaughter (as opposed to Class A manslaughter for higher speeds). After assessing the conduct of defendant's trial counsel, I concluded that the defendant had waived the right to instruction on this manslaughter theory with a deliberate trial strategy.¹¹⁷ Specifically, I believed that the defendant had adopted an "all or nothing" strategy in which the jury would consider only two possible verdicts: guilty of Class A manslaughter or not guilty. That allowed the defendant to argue that any uncertainty over whether the prosecution had shown that he was traveling more than thirty miles per hour over the speed limit, as required for a Class A conviction, should result in an acquittal. But if the jury had also been instructed on Class B manslaughter, "uncertainty over the defendant's speed would only push the jury toward a sure compromise" on that verdict, rather than an acquittal.¹¹⁸

The differing views in this case turned on how one read the record. As I saw it, defense counsel's decision not to raise an available defense was not "so obviously wrong and manifestly unreasonable that the trial judge's accedence to the defendant's wishes resulted in substantial injustice to the defendant."¹¹⁹ Indeed, I thought that defense counsel had lured the judge into an instruction that the majority now deemed obvious error. Again, I was remembering where I came from.

G. Blood in the Neck

In the end, perhaps the most useful test for deciding when to dissent came from my colleague on the Maine Supreme Judicial Court, former Chief Justice

111. 645 A.2d 611 (Me. 1994).

112. See ME. R. CRIM. P. 11.

113. *Edwards v. State*, 645 A.2d at 612.

114. *Id.*

115. *Id.* at 613 (Lipez, J., dissenting).

116. 669 A.2d 170 (Me. 1995).

117. *Id.* at 173-74 (Lipez, J., dissenting).

118. *Id.* at 174 (Lipez, J., dissenting).

119. *Id.* at 175 (Lipez, J., dissenting) (internal quotation marks omitted).

Daniel Wathen. In his usual colorful, on-the-mark way, the Chief Justice told me that, "I wrote a dissent when the blood rushed to my neck. I published the dissent either when someone joined me or the blood remained in my neck." Passion always matters. Whatever the specifics of the case, a dissent is hard work. If your passions are not engaged, you will not endure the burden of writing another opinion.¹²⁰

VIII. CARING ABOUT HERRING: WAS IT REALLY WORTH IT?

If it is important to know when to dissent, it is also important to know when not to dissent. Having reviewed some of my dissents on the Law Court, I find myself asking why I cared so much. For example, in *SST & S, Inc. v. State Tax Assessor*,¹²¹ I dissented in a case involving the refusal of the state tax assessor to exclude from a use tax assessment certain personal property used in the processing of herring. In a display of unintentional irony or defensiveness, I wrote:

[T]he narrow question presented by this appeal is whether the Assessor could have rationally concluded that SST & S had failed to establish that its ice-making equipment and totes were used "directly" in "an operation or integrated series of operations . . . which transforms or converts personal property . . . into a different form, composition or character."¹²²

This was indeed a narrow question. Yet I felt strongly enough about the issue to end the dissent with a parting shot: "The Assessor's construction is an impermissible gloss on a statutory definition of production that by its terms describes a concept of production involving an integrated series of operations."¹²³ The moral of the story is obvious—beware of assessors and appellate judges with a weakness for impermissible glosses.

What was I thinking? The only meaningful audience for this dissent was my colleagues; I can understand that I might have wanted to make the case to them for an alternative outcome. However, when only one of my colleagues was willing to

120. With his characteristic good sense and elegant expression, my colleague, Judge Frank M. Coffin, in his book *On Appeal: Courts, Lawyering, and Judging*, offers a particularly useful distillation of the grounds for dissenting. They are as follows:

1. When the dissenter feels that a *serious mistake of law* has been made on a *significant issue* that is *likely to recur*
2. When all the judges on the panel feel that the *issue is close* and that a dissent will sharpen the focus and reflect the closeness
3. When the dissenter feels that her panel colleagues have *erred as to the facts* . . . or *erred as to procedure*
4. When the dissenter feels strongly enough about the *injustice of a rule* or precedent that he wishes to send a signal to bench and bar, the state courts, the legislature, the law schools, and commentators underscoring the inequity, anomaly, or inconsistency and calling for change.
5. When the dissenter feels strongly enough about the *conduct of the judges or lawyers* involved in the case to issue her own warning to the prosecutor, plaintiff's or defense counsel, or trial court.

FRANK M. COFFIN, *ON APPEAL: COURTS, LAWYERING, AND JUDGING* 227-28 (1994).

121. 675 A.2d 518 (Me. 1996).

122. *Id.* at 522 (Lipez, J., dissenting) (internal quotation marks omitted). The Assessor's conclusion meant that SST & S's ice-making equipment and totes were subject to a use tax; if he had found that these materials were used "directly" in the production of processed herring, they would have been exempt from the tax.

123. *Id.* at 522 (Lipez, J., dissenting).

join me,¹²⁴ I probably should have canned the idea of publishing a dissent. Sure, the losing business might have found consolation in the dissent, but this case did not involve the kind of pain or stakes that makes such a rationale compelling.

Oddly, at least to me, I wrote four dissents in cases involving assessments of real and personal property.¹²⁵ Rereading those dissents from some distance, I find myself again wondering why I cared so much. Yet in each of those cases I was joined by one of my colleagues,¹²⁶ suggesting that my view of the law was not eccentric. The financial stakes in these cases were significant. There is an ongoing tug of war between governmental bodies short of money and citizens who are wary about fair treatment at the hands of government. The participation by judges in some of the legal issues underlying this debate may have been worthwhile. Indeed, in each of these tax cases some larger principles were at stake and hence the discussion was relevant to future cases.¹²⁷

Those larger principles, however, are difficult to discern in cases such as *Frank v. Manpower Temporary Services*,¹²⁸ where I disagreed with the majority's calculation of the average weekly wage for a seasonal worker, or *Wheeler v. White*,¹²⁹

124. For information of no particular value, I offer the following summary of dissenting alliances on the Maine Supreme Court. I dissented alone seven times, was joined by one other justice fifteen times, and two other justices two times. Justices Robert Clifford and Howard Dana each joined me five times in dissent; Justice Paul Rudman joined me three times, and Justices Caroline Glassman, David Roberts, and Chief Justice Wathen each joined me twice. I defy anyone to find an ideological pattern in these numbers. *Wheeler v. White*, 714 A.2d 125, 128 (Me. 1998) (dissent joined by Dana, J.); *State v. Spaulding*, 707 A.2d at 381 (dissent joined by Clifford, J.); *Taliento v. Portland W. Neighborhood Planning Council*, 705 A.2d at 700 (dissent joined by Roberts, J. and Dana, J.); *State v. Ketchum*, 694 A.2d at 919 (dissent joined by Roberts, J.); *Swanson v. Roman Catholic Bishop of Portland*, 692 A.2d at 445 (dissent joined by Dana, J.); *Frank v. Manpower Temp. Servs.*, 687 A.2d 623, 626 (Me. 1996) (dissent joined by Clifford, J.); *State v. Stade*, 683 A.2d 164, 167 (Me. 1996) (dissent joined by Dana, J.); *Weekley v. Town of Scarborough*, 676 A.2d 932, 934 (Me. 1996) (dissent joined by Wathen, C.J.); *Seashore Performing Arts Ctr. v. Town of Old Orchard Beach*, 676 A.2d 482, 486 (Me. 1996) (dissent joined by Clifford, J.); *SST & S, Inc. v. State Tax Assessor*, 675 A.2d at 522 (dissent joined by Clifford, J.); *Guardianship of Boyle*, 674 A.2d 912, 915 (Me. 1996) (dissent joined by Glassman, J., and Rudman, J.); *State v. Berube*, 669 A.2d at 173 (dissent joined by Clifford, J.); *IBM Credit Corp. v. City of Bath*, 665 A.2d 663, 665 (Me. 1995) (dissent joined by Rudman, J.); *LaRochelle v. Crest Shoe Co.*, 655 A.2d 1245, 1248 (Me. 1995) (dissent joined by Wathen, C.J.); *Sinclair v. Sinclair*, 654 A.2d 438, 441 (Me. 1995) (dissent joined by Dana, J.); *Cent. Me. Power Co. v. Town of Moscow*, 649 A.2d 320, 326 (Me. 1994) (dissent joined by Rudman, J.); *Edwards v. State*, 645 A.2d at 612 (dissent joined by Glassman, J.).

125. *Weekley v. Town of Scarborough*, 676 A.2d at 934; *SST & S, Inc. v. State Tax Assessor*, 675 A.2d at 522; *IBM Credit Corp. v. City of Bath*, 665 A.2d at 665; *Cent. Me. Power Co. v. Town of Moscow*, 649 A.2d at 326.

126. *Weekley v. Town of Scarborough*, 676 A.2d at 934; *SST & S Inc. v. State Tax Assessor*, 675 A.2d at 522; *IBM Credit Corp. v. City of Bath*, 665 A.2d at 665; *Cent. Me. Power Co. v. Town of Moscow*, 649 A.2d at 326.

127. In *Weekley v. Town of Scarborough*, that principle was adherence to our precedent. See 676 A.2d at 935 (Lipez, J., dissenting). *SST & S Inc. v. State Tax Assessor* dealt with an alleged conflict between a rule imposed by the state tax assessor and the statute that the rule purported to clarify. See 675 A.2d at 524 (Lipez, J., dissenting). *IBM* and *Central Maine Power Co.* both involved a dispute over the proper methods of valuation. See *IBM Credit Corp. v. City of Bath*, 665 A.2d at 665-66 (Lipez, J., dissenting); *Cent. Me. Power Co. v. Town of Moscow*, 649 A.2d at 326-28 (Lipez, J., dissenting).

128. 687 A.2d 623 (Me. 1996).

129. 1998 ME 137, 714 A.2d 125.

where the issue was whether the court's erroneous jury instructions on the issue of causation had so prejudiced the appellant that the instruction constituted reversible error. The discussions in those cases were so fact bound that those dissents could not be of interest to anyone other than the parties. Not surprisingly, those dissents have never been cited anywhere. I have to question the wisdom of writing them. At least they were mercifully short.¹³⁰

Dissents also have diminished value when the majority affirms the decisions at issue without addressing the issues that are the focus of the dissent. For example, in *United States v. Salimonu*,¹³¹ a drug prosecution involving a search and seizure issue, I focused my dissent on whether a woman had actual or apparent authority to consent to a search of the defendant's apartment.¹³² Believing that the district court had been wrong in its consent analysis and that the case raised important issues about the consent doctrine developed by the United States Supreme Court, I thought that the wrong outcome and the larger issues merited the dissent. Although my colleagues disagreed with my analysis of the consent issue, they saw no need to address it. In their view, any error of the district court in its consent ruling was harmless because of the strength of the other evidence in the case. I disagreed with that position as well.¹³³

Regrettably, however, the majority and I joined issue only on the case-specific harmless error analysis. On the far more important consent issue, I had the field to myself. Although that might seem a desirable circumstance, it greatly reduced the value of the dissent. Also, the harmless error debate meant that there was no chance for en banc review.¹³⁴

Similarly, in *Wills v. Brown University*,¹³⁵ a Title IX sex discrimination case, I had concluded that the trial court erred by excluding certain evidence that the plaintiff had offered to prove her claim that Brown University failed to respond adequately to a hostile education environment created by a professor's assault on her and by his continuing presence in the classroom after the assault.¹³⁶ My colleagues felt that the appellant had never raised this issue adequately in her opening brief and hence had waived any right to argue it on appeal.¹³⁷ Therefore, in going forward with my dissent, I had to spend considerable time at the outset explaining why the appellant had not waived this critical issue on appeal.¹³⁸ Then, in the balance of the lengthy dissent, I explained why the excluded evidence was relevant.¹³⁹ To be sure, that explanation required me to explore some important issues about the nature of hostile environment sex discrimination in a university

130. My Law Court dissents were generally short, averaging 3 pages in the West Law Reports. The court of appeals dissents have been much longer, averaging 12.8 pages.

131. 182 F.3d 63 (1st Cir. 1999).

132. *Id.* at 75-77 (Lipez, J., dissenting).

133. *Id.* at 81 (Lipez, J., dissenting).

134. The harmless error analysis was not, in and of itself, an important enough issue to merit en banc review (it almost never is), and there would have been no reason to reconsider the consent issue in light of the panel's conclusion that even if the district court was incorrect in its consent ruling, any such error did not affect the outcome of the case.

135. 184 F.3d 20 (1st Cir. 1999).

136. *Id.* at 31 (Lipez, J., dissenting).

137. *Id.* at 27.

138. *See id.* at 31-35 (Lipez, J., dissenting).

139. *See id.* at 36-40 (Lipez, J., dissenting).

setting and proof relevant to such a claim.¹⁴⁰ Unfortunately, however, I once again had the field to myself. This one-sided exploration greatly reduced the value of the analysis, and once again assured that there would be no en banc review.

Remembering how much work went into these lengthy dissents, understanding the limited persuasive value of a dissent under the best of circumstances, and knowing as I did that there was no chance of en banc review in those cases, I have to question the value of these efforts.¹⁴¹ Frankly, I wish for such occasions that a simple statement "I dissent" were acceptable. Such unexplained statements of dissent, however, are not considered acceptable, and for good reason. The parties and the public deserve explanations so that they can make judgments about the work of their judges.¹⁴²

IX. FRAMING THE ISSUE

Inescapably, the dissenter has the burden of justifying the decision to dissent by crystalizing the disagreement with the majority and conveying the stakes in the debate. There are different ways of doing this. One technique involves quoting directly from the majority opinion and then using that quote to advantage. For example, in *Sinclair v. Sinclair*,¹⁴³ a case involving a dispute over the retroactive application of legislation altering the statutory right to cure defaults in mortgage documents, the majority had to contend with the proposition that "all statutes will be considered to have a prospective operation only, unless the legislative intent to the contrary is clearly expressed or necessarily implied in the language used."¹⁴⁴ In dealing with this issue, the majority justified the retroactive application of the statute because of language in the legislation that "suggests . . . its purpose" and which, further indicated that "the Legislature must have recognized the undesirability of prospective application."¹⁴⁵ I thought that the majority's waffling word choices—"suggests," "must have recognized"—ran afoul of the requirement of clear legislative intent, and I said so: "Suggested purposes and imputed recognitions are not the clear expressions of legislative intent required by the rule of statutory construction that bases retroactive application of a statute on clear expressions of legislative intent."¹⁴⁶ Hopefully, that one sentence captured the essence of the disagreement between the majority and the dissent.

140. *See id.* (Lipez, J., dissenting).

141. No other court has cited these dissents in grappling with similar issues.

142. As Justice Brennan has explained, "Dissent for its own sake has no value However, where significant and deeply held disagreement exists, members of the Court have a responsibility to articulate it. This is why, when I dissent, I always say why I am doing so. Simply to say 'I dissent' will not do." Brennan, *supra* note 3, at 435.

143. 654 A.2d 438 (Me. 1995).

144. *Id.* at 441 (Lipez, J., dissenting) (quoting *Miller v. Fallon*, 134 Me. 145, 148, 183 A. 416, 417 (1936)).

145. *Id.* at 440.

146. *Id.* at 442 (Lipez, J., dissenting). The statute at issue, ME. REV. STAT. ANN. tit. 14, § 6111 (West 1993), required that mortgagors notify private residential mortgagees of their right to cure a default before instituting foreclosure proceedings. The parties in *Sinclair* disputed whether section 6111 applied to mortgages executed before its effective date. *Sinclair v. Sinclair*, 654 A.2d at 438. The majority concluded that it did, despite the statute's silence on the subject, because retroactive application was consistent with its legislative purpose of "protect[ing] homeowners from noncommercial lenders that are not otherwise subject to regulation." *Id.* at 442.

This technique of quoting the majority opinion in the dissent is particularly important in framing the debate in federal cases, where the decisions tend to be much longer than the state court opinions. Working through all of those pages, the reader who finally gets to the dissent can easily forget what all of the fuss is about. For example, in *Logiodice v. Trustees of Maine Central Institute*,¹⁴⁷ the issue was whether a "private" high school funded substantially by a public school district was a state actor for purposes of the Due Process Clause of the Fourteenth Amendment when it suspended one of its students for seventeen days.¹⁴⁸ The state actor determination required the consideration of many factors. To try to explain how I differed from the majority in the analysis of these factors, I would frequently state the majority position before citing my own. This paragraph was typical:

When discussing the burdens imposed by state actor status, the majority recognizes the interests of contract schools in avoiding the "rigidities [and] lawsuits" that accompany state actor status. Given the increasing levels of violence plaguing schools today, I agree that we must respect the school administrators' disciplinary prerogatives. However, we do not have to exempt a school such as MCI from all constitutional standards to advance that goal. Instead, we can respect those prerogatives within a constitutional framework.¹⁴⁹

Similarly, in *Phillip Morris, Inc. v. Reilly*,¹⁵⁰ the issue was whether a Massachusetts statute requiring tobacco companies to disclose constituent ingredients of their products was a facially unconstitutional taking of their property, or whether it deprived them of that property without due process of law. In dissenting from the majority's conclusion that the state's disclosure act constituted a regulatory taking, I referred repeatedly to the positions taken by the majority before stating my contrary view. This exchange was typical:

Notwithstanding the express terms of the Act, [the lead opinion] proceeds on the assumption that Massachusetts necessarily will disclose the tobacco companies' entire ingredient lists. [It] justifies that assumption by reference to the district court's opinion, stating that "[a] prior holding, which is not currently before us, decided that under [the Disclosure Act], Massachusetts will publish the tobacco companies' ingredient lists." The district court decided no such thing.¹⁵¹

Although these pointed exchanges leave no doubt about the essence of the disagreement between the majority and the dissenting opinions, they can create an unpleasant tone and impair collegiality. Wary of these costs, I have sometimes adopted an alternative strategy for highlighting my disagreements with the majority. Not surprisingly, the majority opinion frequently reflects the positions taken by the winning party in its brief. Therefore, I have cited the arguments of the prevailing party in my dissents as the basis for a response, thereby avoiding a direct confrontation with the majority. This approach produces a more civil tone without necessarily sacrificing clarity on the points of disagreement. However, there is something artificial about this studied indifference to the language of the majority, and I do not generally favor this indirect approach. With sensitivity to

147. 296 F.3d 22 (1st Cir. 2002).

148. *Id.* at 26-31.

149. *Id.* at 41 (Lipez, J., dissenting) (alteration in original).

150. 312 F.3d 24 (1st Cir. 2002) (en banc).

151. *Id.* at 54 (Lipez, J., dissenting).

the power of language to offend, I think you can engage in a direct exchange with the majority without being uncivil.

The beginnings and endings of dissents are particularly important moments in framing the debate with the majority. The beginning should explain why you are dissenting; the ending should be a forceful last word. In *State v. Stade*,¹⁵² a case involving a Due Process challenge to the conduct of a police officer who had administered a drug test to a defendant suspected of operating under the influence, the majority decided that the officer's conduct ran afoul of the federal Due Process Clause.¹⁵³ Disagreeing, I wrote at the beginning of the dissent that, "I respectfully dissent because Officer Chandler's conduct did not violate the canons of fundamental fairness protected by the Due Process Clause of the Fourteenth Amendment."¹⁵⁴ After several pages of analysis, I concluded the dissent with a statement that echoed its beginning: "Officer Chandler did nothing that constitutes the type of oppressive and deceptive conduct proscribed by the Due Process Clause of the Fourteenth Amendment. To hold that such conduct deprives Stade of his rights 'within the meaning of the Fourteenth Amendment would trivialize the centuries-old principle of due process of law.'"¹⁵⁵ Whatever the judgment about the merits of the competing arguments, the reader surely understood from these sentences the stakes in this case.

Some dissents require an immersion in mind-numbing factual detail to explain the disagreement with the majority. Before diving into this detail, the dissenter must explain to the reader why the effort is worth it. For example, in *Mountain Valley Education Association v. Maine School Administrative District No. 43*,¹⁵⁶ a case involving a public employer's unilateral implementation of its proposals on wages and insurance after a protracted labor dispute, I disagreed with the majority's approval of the employer's conduct and its reading of the Municipal Public Employees Labor Relations Law. Before getting into the convoluted facts of the negotiating history of the parties, I tried to capture the full implications of this dispute:

The ease of unilateral implementation by the employer after the exhaustion of the statutory impasse resolution procedures will be a disincentive to dispute resolution by the employer during the statutory impasse resolution process. For that reason the diluted impasse standard approved in this case is contrary to the premise of the Municipal Public Employees Labor Relations Law and fundamental tenets of fairness in public sector bargaining.¹⁵⁷

Similarly, in *Devoid v. Clair Buick Cadillac, Inc.*,¹⁵⁸ a case involving the application of Maine's Whistleblowers' Protection Act, the trial court and the majority had denied the employee relief under the Act.¹⁵⁹ Before getting into the statutory and factual detail required by the dissent, I wrote: "[T]he Court ratifies an erroneous construction of the Whistleblowers' Protection Act that needlessly undermines

152. 683 A.2d 164 (Me. 1996).

153. *Id.* at 166.

154. *Id.* at 167 (Lipez, J., dissenting).

155. *Id.* at 170 (Lipez, J., dissenting) (quoting *Daniels v. Williams*, 474 U.S. 327, 332 (1986)).

156. 655 A.2d 348 (Me. 1995).

157. *Id.* at 355 (Lipez, J., dissenting).

158. 669 A.2d 749 (Me. 1996).

159. *Id.* at 751.

the Act's protective purpose."¹⁶⁰ A reader who cares about those protections would understand the stakes at once.

Of course, some cases are simply too complicated for a one or two sentence distillation of the disagreement. Still, the dissenter has to explain it. In *Guardianship of Boyle*,¹⁶¹ the majority had decided that the State had the right to authorize the treatment of an institutionalized patient with psychotropic drugs when the evidence was clear that without such drugs she would almost surely remain institutionalized for the rest of her life.¹⁶² The patient, however, had competently stated her objections to such psychotropic medications.¹⁶³ The choices in this difficult case were both problematic.¹⁶⁴ Near the end of this dissent, the longest one that I wrote on the Law Court, I tried to summarize the stakes in this case:

In the final analysis, this case is a contest between competing views of where Susan Boyle will have a better life. She made the competent decision that she would have a better life free of the medication she fears even if that decision means a life inside an institution. The State insists that she should be forced to take the medication so she can enjoy a better life outside of the institution. This position elevates deinstitutionalization to a state interest of exaggerated import and diminishes Boyle's right to be free of unwanted medical treatment that poses known risks of dangerous side effects.¹⁶⁵

Dissents are made for cases where there are no good answers.

X. THE VOICE OF THE DISSENTER

The pleasure of dissent has been noted by many judges. Justice William O. Douglas said that "the right to dissent is the only thing that makes life tolerable for a judge of an appellate court."¹⁶⁶ Justice Scalia has been almost as enthusiastic about the writing of dissents:

To be able to write an opinion solely for oneself, without the need to accommodate, to any degree whatever, the more-or-less-differing views of one's colleagues; to address precisely the points of law that one considers important and *no others*; to express precisely the degree of quibble, or foreboding, or disbelief, or indignation that one believes the majority's disposition should engender—that is indeed an unparalleled pleasure.¹⁶⁷

Judge Patricia Wald has also described the liberating effect of writing a dissent:

Far more than in majority opinions, the voice of a single dissenting judge uses the first person to speculate, make dire predictions, or chastise colleagues who have gone wrong. . . . The irate dissenter is apt to begin with some variation on the theme, "Never in my ten years on the bench have I seen a case as sad as this." The strategy of personalization in dissent is to separate the dissenter from the cold, impersonal, authoritarian judges of the majority, who impliedly do not take

160. *Id.* (Lipez, J., dissenting).

161. 674 A.2d 912 (Me. 1996).

162. *Id.* at 915.

163. *Id.* at 913-14.

164. As an indication of the difficulty of the case, this was one of the two dissents I wrote on the Law Court where I was joined by two of my colleagues. *Id.* at 915 (Lipez, J., dissenting).

165. *Id.* at 920 (Lipez, J., dissenting).

166. See Scalia, *supra* note 18, at 42.

167. *Id.*

the human condition into account when they mercilessly impose "the law."

A dissent is liberating. No other judge need agree or even be consulted. Exuberant (or excess) prose is unconstrained.¹⁶⁸

Although there is some excess in this description, there is no question that writing a dissent offers the freedom of writing in your own voice. Obviously, when you are writing for a court, you must try to accommodate the concerns and preferences of your colleagues. There is nothing wrong with that. That is how the appellate process works. At the same time, that need for accommodation inevitably tempers your writing style. On the Law Court, if a dissent is joined by one or two colleagues, there is still a need for some accommodation in the writing. On a court of appeals panel, where you always dissent alone, there is no need for such accommodation. With that restraint gone, you must rely on your own good judgment to avoid excessive language.

I have tried to avoid exuberant or excess prose in my dissents. Nevertheless, I have taken some pointed pokes at the majority. All too predictably, I began one dissent in a workers' compensation case by writing: "This case illustrates once again that hard cases make bad law."¹⁶⁹ I ended the dissent with a critical jab: "In short, there is no reason for this Court to ignore a definitional ambiguity by resorting to an undocumented common usage."¹⁷⁰ In a case involving a dispute over the proper reading of a liquidated damages provision in a contract, I said at the end of my dissent that my colleagues did not understand the law: "In effect, the court's approach results in an award of specific performance to the Town under the guise of liquidated damages. Such an approach reflects a misapprehension of applicable legal principles."¹⁷¹ In a disagreement over the application of the "piercing the corporate veil" doctrine, I charged the majority with "rob[bing] the remedy of its continuing vitality as a deterrent against abuse of the corporate form."¹⁷² In a dissent about the work of the state tax assessor, I said that my colleagues in the majority had gone "astray"¹⁷³ and that their application of principles of deference had "clouded the Court's view in this case."¹⁷⁴ Newly arrived on the First Circuit Court of Appeals, I said that the majority in an affirmative action case had gone "awry" in its use of precedents.¹⁷⁵ I guess that going "awry" is the federal version of going "astray."

168. Patricia Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. REV. 1371, 1412-13 (1995).

169. *LaRochelle v. Crest Shoe Co.*, 655 A.2d 1245, 1248 (Me. 1995) (Lipez, J., dissenting).

170. *Id.* at 1248-49 (Lipez, J., dissenting). *LaRochelle* required us to determine whether the phrase "pending appeal," as used in ME. REV. STAT. ANN. tit. 39, § 104-A1 (West 1989), included the pendency of a motion for findings of fact or was limited to "a period that commences with the filing of a notice of appeal and ends with a resolution of that appeal." *LaRochelle v. Crest Shoe Co.*, 655 A.2d at 1247. The majority concluded that the latter was correct "[a]s a matter of common usage" and thus that the statute was unambiguous. *Id.* I believed that the term "pending" was ambiguous and that the statute's legislative history supported the more expansive reading. *Id.* at 1248 (Lipez, J., dissenting).

171. *Seashore Performing Arts Ctr. v. Town of Old Orchard Beach*, 676 A.2d 482, 488 (Me. 1996) (Lipez, J., dissenting).

172. *Theberge v. Darbro, Inc.*, 684 A.2d 1298, 1304 (Me. 1996) (Lipez, J., dissenting).

173. *Cent. Me. Power Co. v. Town of Moscow*, 649 A.2d 320, 326 (Me. 1994) (Lipez, J., dissenting).

174. *Id.* at 328 (Lipez, J., dissenting).

175. *Wessmann v. Gittens*, 160 F.3d 790, 833 (1st Cir. 1998) (Lipez, J., dissenting).

Although I might have changed some of this language (perhaps charging my colleagues with "misapplying" legal principles rather than "misapprehending" them or saying that they had "weakened" remedies rather than "robbing" them of their vitality), I think on the whole this is tame stuff. I have certainly penned nothing comparable to this: "The decision of the Majority of the Court in this case has dealt a staggering blow to the forces of morality, decency and human dignity in the Commonwealth of Pennsylvania."¹⁷⁶ Such language does convey "[a] sense of urgency and of impending doom [that] is almost a *sine qua non* of the dissenting voice."¹⁷⁷ By that standard, my dissents fail the test.

XI. COLLEGIALITY

There is no gainsaying the proposition that dissents are a threat to collegiality on an appellate court. As my colleague Judge Coffin has put it, dissents (as well as concurrences)¹⁷⁸ are "ruptures in the cloak of consensus ordinarily worn by collegiality. To the extent that separate opinions are deemed necessary by the writers, to that extent is collegiality diluted."¹⁷⁹ Judge Coffin has warned of the cost to collegiality of "corrosive language," defined as "the unthinking use of words that are, in the mind of the reader or listener, so imbued with irritating or pejorative meaning that rational discussion is likely to be derailed."¹⁸⁰

At the core of the dissent there is anger or disappointment about an unacceptable outcome. Without vigilance, that anger or disappointment can produce language that may satisfy some expressive need of the dissenter but that may, at the same time, offend colleagues; hence, the importance of that convention so often found at the beginning or end of dissents—"I respectfully dissent." Lest that lan-

176. *Commonwealth v. Robin*, 218 A.2d 546, 547 (Pa. 1966) (Musmanno, J., dissenting). The "staggering blow" that Justice Musmanno referred to was the majority's decision that Pennsylvania could not constitutionally enjoin circulation of the book *Tropic of Cancer* pursuant to its obscenity statute. *Id.* at 547.

177. Wald, *supra* note 168, at 1413.

178. Indeed, concurrences do raise some of the same issues as dissents. Justice Scalia equates dissents with "genuine concurrences," described as "separate writings that disagree with the grounds upon which the court has rested its decision, or that disagree with the court's omission of a ground which the concurring judge considers central." Scalia, *supra* note 18, at 33. I wrote four concurrences on the Law Court and have written eleven on the court of appeals. Of those, only three or four might meet Justice Scalia's definition of a genuine concurrence. However, they also do not meet Justice Scalia's definition of concurring opinions that abuse the tradition of separate opinions—namely, "separate concurrences that are written only to say the same thing better than the court has done, or, worse still, to display the intensity of the concurring judge's feeling on the issue before the court." *Id.* Instead, I have usually written concurrences because I wanted to convey a perspective on the case not set forth in the majority opinion, or because I wanted to promote some rethinking on an issue that might recur in a future case. For example, in *Getty Petroleum Marketing, Inc. v. Capital Terminal Co.*, 391 F.3d 312 (1st Cir. 2004), a case involving the doctrine of judicial notice of law, I wrote at some length on changes taking place in the application of that doctrine in the "hope that the discussion will inform the judicial notice of law analysis when comparable judicial notice of law issues arise in future cases." *Id.* at 321 (Lipez, J., concurring). Such a concurrence meets one of Judge Coffin's justifications for a concurrence—"When a judge wishes to *expand the majority's reasoning* on a particular point, e.g., the judge wishes to drive home a point to the bar or the trial courts" COFFIN, *supra* note 120, at 227. Perhaps, in time, I will write a sequel to this article called "Some Reflections on Concurrences."

179. COFFIN, *supra* note 120, at 224.

180. *Id.* at 219.

guage seem ironic, the dissenter must remember that the words used must match the respect professed.¹⁸¹

Still, even with the use of language that gives no offense, the very fact of a dissent will give some. It is only human to dislike being challenged in your views. A dissent is a direct challenge in the public arena where judgments will be made about who has the best of the arguments. The competitive juices inevitably flow. Also, dissents delay the issuance of opinions and they make more work for the judges in the majority, who may feel the need to respond. This recognition—that dissents inconvenience your colleagues—adds to the pressure of writing a dissent. As I alluded to earlier,¹⁸² on both the Law Court and the court of appeals, there is an unwritten rule that if you are going to dissent, you must give that dissent priority over your own opinions in the cases assigned to you. You do not turn to the dissent when you “can get around to it.” You get around to it now or you do not dissent. This obligation is highly disruptive of your own work, particularly if the dissent involves a large record which must be examined before writing. I have learned from hard experience that I should never promise a dissent within a particular time frame. My estimates have always been woefully wrong. Although colleagues will not send you memos telling you to hurry up, you know that they are thinking about it. They dislike the delay and you dislike the pressure.

In short, there are always collegiality costs in dissenting. Thus, Judge Coffin’s advice should be heeded: “[W]e judges are well advised to resist the temptation [to dissent] unless we find a compelling interest and no more effective alternative.”¹⁸³ As I now acknowledge,¹⁸⁴ a few of my dissents (caring about herring?) have not met this compelling interest standard.

XII. VINDICATION

It is the conceit of most dissenters that, sooner or later, their views will become the law. To test the validity of this conceit in my own dissents, I checked the record. It was a sobering experience. As noted, I wrote twenty-four dissents during my almost four years on the Law Court. To date, I have written fifteen dissents on the First Circuit. The majority of these dissents (twenty-eight) have not been cited in any other opinions. Several have simply been cited for basic propositions of law.¹⁸⁵ A few others have been cited for my summary of the majority’s hold-

181. Readers are so familiar with this convention that its omission can be particularly telling. It was universally noted that Justice Ginsberg never used the word “respectfully” in her dissent in *Bush v. Gore*, 531 U.S. 98, 135-44 (2000) (Ginsburg, J., dissenting). See Linda Greenhouse, *Bush v. Gore: A special report; Election Case a Test and a Trauma for Justices*, N.Y. TIMES, Feb. 20, 2001, at A1.

182. See *supra* Part IV.

183. COFFIN, *supra* note 120, at 227.

184. See *supra* Part VIII.

185. E.g., *United States v. Lawlor*, 324 F. Supp. 2d 81, 85 (D. Me. 2004) (citing my dissent in *United States v. Beaudoin*, 362 F.3d 60, 72 (1st Cir. 2004), for the proposition that absent exigent circumstances, police must have a warrant to search a person’s home); *Malicki v. Doe*, 814 So. 2d 347, 357 n.7 (Fla. 2002) (citing my dissent in *Swanson v. Roman Catholic Bishop of Portland*, 1997 ME 63 ¶ 16, 692 A.2d 441, 446-47, for the assertion that the Supreme Court has offered little guidance on whether the First Amendment bars negligence claims against religious institutions).

ing.¹⁸⁶ The substantive reasoning in a dissent attracted the attention of other judges in only three cases. In two of those, the attention it captured was that of my own colleagues who then voted for en banc review.¹⁸⁷ This is not a reassuring record. I hope that dissents, like good wine, become better with age.

My dissent in *Laro v. New Hampshire*¹⁸⁸ offers some reason for hope. That case involved a provision of the Family Medical Leave Act (FMLA) creating a private cause of action against the State for money damages for a violation of the personal medical leave provision of the Act.¹⁸⁹ Anticipating how the Supreme Court would apply its precedents from *Kimel v. Florida Board of Regents*,¹⁹⁰ and *Board of Trustees of the University of Alabama v. Garrett*,¹⁹¹ the majority concluded that Congress's abrogation of state sovereign immunity in the FMLA violated the Eleventh Amendment.¹⁹² I disagreed. Those cases involved legislation requiring states to alter age and disability related practices that, under rational basis review, would not be adjudged constitutional violations under Section One of the Fourteenth Amendment.¹⁹³ The FMLA, by contrast, addressed gender discrimination.¹⁹⁴ As I pointed out in my dissent, state actions involving gender discrimination are subject to heightened scrutiny, not rational basis review.¹⁹⁵ In applying the Supreme Court's congruence and proportionality test to the FMLA's prophylactic scheme and the legislative record supporting it, I felt that the heightened scrutiny standard "require[d] greater deference to congressional action addressing gender discrimination."¹⁹⁶ For that reason, I concluded that Congress

186. *E.g.*, *Smith v. Heritage Salmon, Inc.*, 180 F. Supp. 2d 208, 217 (D. Me. 2002) (citing my dissent in *Devoid v. Clair Buick Cadillac, Inc.*, 669 A.2d 749, 750-51 (Me. 1996), to explain that "according to the Law Court, an employee who refuses to obey an order from his employer because he believes it to be illegal, and who tells his employer as much, is not deemed to have reported the illegality").

187. *See United States v. Councilman*, 373 F.3d 197 (1st Cir. 2004), *rev'd en banc*, 385 F.3d 793 (1st Cir. 2004); *Ellsworth v. Warden*, 318 F.3d 285 (1st Cir. 2003), *rev'd en banc*, 333 F.3d 1 (1st Cir. 2003).

188. 259 F.3d 1, 17 (1st Cir. 2001) (Lipez, J., dissenting).

189. In *Laro*, a state employee was terminated while on a medical leave of absence under the FMLA. *Id.* at 4. He sued the State for monetary damages, claiming that it violated the Act "by terminating his employment before the expiration of the twelve week period of unpaid leave guaranteed under the FMLA." *Id.* at 5. Upon the State's motion, the district court dismissed the suit on the grounds that the State was immune to suit in federal court under the Eleventh Amendment. *Id.* *Laro* appealed, asserting that the personal medical leave provisions of the FMLA properly abrogated the State's Eleventh Amendment immunity. *Id.* at 4, 13.

190. 528 U.S. 62 (2000).

191. 531 U.S. 356 (2001).

192. *Laro v. New Hampshire*, 259 F.3d at 4.

193. Section One of the Fourteenth Amendment provides, in part, that:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

194. Congress enacted the FMLA to "minimize[] the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis; and to promote the goal of equal employment opportunity for women and men." 29 U.S.C. § 2601(b)(4)-(5)(1999).

195. *Laro v. New Hampshire*, 259 F.3d at 17 (Lipez, J., dissenting).

196. *Id.* at 17-18 (Lipez, J., dissenting).

had properly exercised its Section Five authority under the Fourteenth Amendment¹⁹⁷ in abrogating the State's Eleventh Amendment immunity in the FMLA.¹⁹⁸ In a 2003 decision in the Tenth Circuit, *Brockman v. Wyoming Department of Family Services*,¹⁹⁹ the panel acknowledged that I had made a "colorable argument to the effect that the self-care provision of the FMLA must be viewed as part of the Act as a whole, and that it would therefore be a valid abrogation of states' sovereign immunity."²⁰⁰ However, the Tenth Circuit "decline[d] to adopt that view," persuaded by the *Laro* majority's position that the FMLA's legislative history did not adequately connect the personal medical leave provision to the prevention of gender discrimination.²⁰¹

But there is more to this story. In the 2003 case of *Nevada Department of Human Resources v. Hibbs*,²⁰² the United States Supreme Court, in a decision written by Chief Justice Rehnquist, took exactly the position that I had advocated in my dissent in *Laro* on the significance of gender discrimination. The Court distinguished *Garrett* and *Kimel* on the grounds that they had involved age or disability-based discrimination, whereas in the FMLA, "Congress directed its attention to state gender discrimination, which triggers a heightened level of scrutiny. Because the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our rational-basis test . . . it was easier for Congress to show a pattern of state constitutional violations."²⁰³ Although my dissent (somewhat disappointingly) was not cited in Chief Justice Rehnquist's decision, I could indulge the fantasy that one of the Supreme Court justices or, more likely, a law clerk, had at least read my dissent in working on the Supreme Court's opinion.²⁰⁴

I draw a valuable lesson from this experience. Anticipating what the Supreme Court might do in an area of genuine uncertainty is a dangerous business. If you draw the good faith conclusion that the Supreme Court has not foreclosed the op-

197. Section Five of the Fourteenth Amendment provides that: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

198. *Laro v. New Hampshire*, 259 F.3d at 24 (Lipez, J., dissenting).

199. 342 F.3d 1159 (10th Cir. 2003).

200. *Id.* at 1164.

201. *Id.* at 1164-65.

202. 538 U.S. 721 (2003).

203. *Id.* at 736 (citation omitted).

204. While the Court did vindicate my position that statutes abrogating state immunity under Congress's Section 5 power to reduce gender discrimination should be analyzed differently than the statutes at issue in *Garrett* and *Kimel*, it did so in considering a different subsection of the FMLA than we had before us in *Laro*. *Hibbs* involved a challenge to an FMLA provision that entitled employees to take unpaid leave for the onset of a "serious health condition" in a spouse, child or parent. *Nevada Dept. of Human Res. v. Hibbs*, 538 U.S. at 725 (quoting 29 U.S.C. § 2612(a)(1)(C) (1999)). The majority's analysis focused specifically on the connection between that provision and evidence of discrimination resulting from the assumption that women are overwhelmingly responsible for caring for ailing family members. *Id.* at 736-38. That reasoning may not apply as directly in the personal medical leave context we confronted in *Laro*. See *Laro v. New Hampshire*, 259 F.3d at 9 n.6. *Hibbs* therefore left open the question of whether the FMLA's personal medical leave provision is constitutional. See *Nevada Dept. of Human Res. v. Hibbs*, 538 U.S. at 740.

tion that you think is the better one, you are free to choose it. You might just be right.²⁰⁵

XIII. CONCLUSION

These are some of the hard facts about dissents. They are self-assigned burdens that greatly increase a judge's already heavy load of writing assignments. They must be written quickly because they affect the ability of colleagues to finish their own work. They inevitably strain relations with colleagues even if the language of the dissent is temperate. A dissent usually "brings no hope of present reward or vindication."²⁰⁶ To court-watchers, a dissent may seem an undisciplined act of judicial egotism. Worst of all, since dissents have no precedential value, they may not be read by anyone.

So why write a dissent? Drawing on pop psychology, I think there are unacceptable personal costs to a judge who always buries disagreements just to "go with the flow." Self-respect suffers from too much silence. To be sure, the paradox noted by Justice Brennan—the Court "is at once the whole and its constituent parts"²⁰⁷—means that every disagreement does not require or justify a dissent. In our precedent-bound system, some cases will rarely be precedents because the outcome of the case is so fact-driven. In these cases, when judges disagree over the reading of contract language, the sufficiency of the evidence, or the exercise of discretion in an evidentiary ruling, there is seldom a good reason to dissent. Is there compromise in remaining silent when you disagree with the outcome in such cases? Yes. Is your vote in such cases an inaccurate reflection of your true views about the case? Yes. Is your vote in those cases an abdication of your judicial responsibility? No. Your obligations as a judge also extend to the court as an institution, and your concerns about the effect on the court of improvident dissents are legitimate.

The calculus changes dramatically, however, when your disagreements with your colleagues involve issues of law that will have reverberations far beyond the immediate case. Applying the generalities of the Constitution, interpreting statutes of broad applicability, articulating standards of conduct for individuals, businesses and professions, deciding the kinds of injuries that are compensable—these are decisions that affect how we all relate to our government, and how we all lead our daily lives. In these cases, where the stakes are so great, there is a duty to dissent.

205. I remember well the internal debate that I had with myself while working on this dissent. The direction that the Supreme Court had taken in its Eleventh Amendment jurisprudence seemed almost inexorable. The distinction between the application of that jurisprudence to rational basis review and heightened scrutiny review had been noted primarily in academic journals. See *Laro v. New Hampshire*, 259 F.3d at 20 (Lipez, J., dissenting) (citing Brian Ray, Note, "Out the Window"? Prospects for the EPA and the FMLA after *Kimel v. Florida Board of Regents*, 61 OHIO ST. L.J. 1755, 1783 (2000)). Although the distinction was sensible, I thought it was probably wishful thinking. To her everlasting credit, one of my law clerks at the time, Rosemary Quigley, persuaded me with a mix of logic and passion that the Supreme Court might just buy this sensible distinction, and a strong dissent from a court of appeals judge could help. I like to think that it did. Sadly, Rosemary passed away last year after a lifelong struggle with cystic fibrosis. She was a remarkable woman, and I will always be grateful for the opportunity to work with her.

206. Wald, *supra* note 168, at 1412.

207. Brennan, *supra* note 3, at 432.

This reference to duty is a recurring theme in the literature on dissents, where it is explained in institutional terms. Justice Brennan sees the process of dissenting as enhancing the legitimacy of an appellate court:

[W]hen I dissent, I always say why I am doing so.

...

Courts derive legal principles, and have a duty to explain why and how a given rule has come to be. . . . The integrity of the process through which a rule is forged and fashioned is as important as the result itself; if it were not, the legitimacy of the rule would be doubtful. Dissents contribute to the integrity of the process, not only by directing attention to perceived difficulties with the majority's opinion, but, . . . also by contributing to the marketplace of competing ideas.²⁰⁸

I think Justice Brennan is exactly right. Far from undermining respect for the courts, a dissent signals the difficulties of the issues before the judges and portrays their collective efforts to find answers in the body of law before them. The fact of disagreement does not taint the outcome or the process. To the contrary, it reassures the public that each judge on a court takes seriously his or her responsibility to decide the case correctly.

Even so, dissenting judges do not get good grades just for doing their job. The majority opinion will be read because, for better or worse, it is the law. Dissents, on the other hand, "need not be read after the date of their issuance. They will not be cited, and will not be remembered, unless some quality of thought or of expression commends them to later generations."²⁰⁹ With due deference to the demands of collegiality, you must convey the anger or disappointment at the core of every dissent of any value. Therein lies the great challenge of the dissent—to convince the reader of both the rightness and large consequence of your position without resorting to overheated language.

In his 1896 dissent in *Plessy v. Ferguson*,²¹⁰ the first Justice John Harlan wrote:

[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.

...

The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law.²¹¹

With this restrained but eloquent language, Justice Harlan indicted the majority's misguided vision of the Constitution, prophesied the harm that would follow from

208. *Id.* (emphasis omitted).

209. Scalia, *supra* note 18, at 42.

210. 163 U.S. 537, 552 (1896) (Harlan, J., dissenting), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

211. *Id.* at 559-60 (Harlan, J., dissenting).

this linkage of law and racial separation, and planted the seeds for his vindication in *Brown v. Board of Education*.²¹²

To be sure, most dissents do not involve such momentous issues. But even when the stakes are smaller, the loss of the debate does not preclude the possibility that a future case will turn out differently because of the seeds that you have planted. If that day comes, it may provide a fairer measure of the value of your dissent.

For now, in the absence of such vindication, I must leave it to others to make judgments about the value or quality of the dissents that I have written. I only know that these reflections, and the preparations for them, will force me to ask myself harder questions about when I should dissent and how I should do it. In that sense, writing this article has been instructive for me. I hope that is also true for the reader.

212. 347 U.S. 483 (1954).